Vol. IV

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 207

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

TEX-PENN OIL COMPANY

No. 208

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

M. L. BENEDUM

No. 209

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

F. B. PARRIOTT

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1936

CERTIORARI GRANTED, OCTOBER 12, 1936

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

DOCKET NO. 30990.

M. L. BENEDUM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF RECORD

APPEAL FROM THE UNITED STATES BOARD OF TAX APPEALS.

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M. L. Benedum v. Commissioner.

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United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Docket No. 30990

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	APPEARANCES: *For Petitioner:* John W. Davis, Esq., Weston Vernon, Jr., Esq., Horace A. Mann, Esq., Harry Friedman, Esq., John O. Wicks, Esq., Charles W. Jones, Esq., Montgomery B. Angell, Esq., J. C. Adams, Esq. *For Respondent:* F. Schlosser, Esq., Brooks Fullerton, Esq., J. D. Foley, Esq., O. Hamele, Esq.

Docket Entries.

1927

Sept. 3—Petition received and filed. Taxpayer notified. (Fee paid.)

Sept. 6—Copy of petition served on General Counsel.

Nov. 5—Answer filed by General Counsel.

Nov. 8—Copy served on taxpayer—General Calendar.

1929

Feb. 4—Motion to consolidate with dockets 11539 and 30989 for hearing April 15, 1929, filed by General Counsel.

Feb. 5—Order consolidating with dockets 11539 and 30989 and placing proceedings on day calendar for hearing 6/3/29 entered.

Apr. 9—Motion to continue to Fall Calendar filed by taxpayer. 4/10/29 granted.

1929

Apr. 15—Notice of the appearance of Horace A. Mann, attorney for taxpayer, filed.

Aug. 7—Hearing set Oct. 21, 1929.

Sept. 9—Motion to continue hearing to Spring Term filed by taxpayer. 9/10/29 granted.

Sept. 11—Motion to place on Reserve Calendar filed by General Counsel. Granted.

1930

Aug. 15—Hearing set Oct. 7, 1930.

Sept. 16—Motion for continuance to March 15, 1931, filed by taxpayer. Granted, to 3/16/31.

Nov. 8—Notice of appearance of Montgomery B. Angell as attorney for taxpayer filed.

Nov. 14—Notice of appearance of John W. Davis as attorney for taxpayer filed.

1931

Mar. 9—Motion for continuance to May 15, 1931, filed by taxpayer. 3/11/31 granted to 5/18/31.

Mar. 24—Motion for leave to file amended petition, amendment tendered, filed by taxpayer.

Mar. 26—Hearing set April 15, 1931, on motion.

Mar. 26—Copy of motion and amended petition served on General Counsel.

Apr. 9—Motion for continuance on merits filed by taxpayer. 4/9/31 granted to Oct. 14, 1931.

Apr. 15—Hearing had before Mr. Marquette on motion for leave to amend petition—granted—usual time to answer.

Apr. 15—Order that amended petition lodged with the Board under date of 3/24/31 be filed and respondent given the usual time to answer, entered.

May 15—Answer to amended petition filed by General Counsel. 5/27/31 copy served.

1931

May 20—Motion for order to strike portion of answer filed by taxpayer. 5/21/31 copy served on General Counsel.

May 21—Hearing set May 21, 1931, on motion.

May 21—Hearing had before Mr. Arundell on motion to strike portion of answer—granted. Motion to make answer more definite and certain granted. Granted to July 1st to amend answer. Petitioner moves orally to strike affirmative relief pleading from amended answer—denied.

May 25—Order granting motion and respondent given until July 1, 1931, to file an amended answer entered.

June 2—Transcript of hearing of May 21, 1931, filed.

June 23—Amended answer to amended petition filed by General Counsel. 6/24/31 copy served on taxpayer.

July 14—Reply to amended answer filed by taxpayer. 7/14/31 copy served on General Counsel.

July 21—Motion to confine hearing in the first instance to petitioner's assignments of error numbered 5(a) to 5(h), inclusive, of the amended petition, filed by taxpayer.

July 23—Hearing set Sept. 9, 1931, on motion.

July 23—Copy of motion and notice of hearing date served on General Counsel.

July 27—Notice of appearance of Charles W. Jones and Harry Friedman as counsel for taxpayer filed.

Aug. 8—Motion for continuance sine die on hearing confining hearing to certain issues in motion of 7/21/31 filed by taxpayer. 8/12/31 granted.

Oct. 8—Motion to place on the Reserve Calendar filed by both parties. 10/12/31 continued to 2/8/32.

Dec. 5—Notice of hearing on Dec. 9, 1930, for argument on motion to limit hearing.

1931

Dec. 9 & 10—Hearing had before Mr. Murdock on motion to separate or sever issues—argued and decision withheld pending submission of new motion. Dec. 10 petitioner submits amended motion re severance—no objections by respondent—motion granted.

Dec. 10—Order that amended motion to confine the hearing in the first instance be granted, entered.

1932

Jan. 16—Transcript of hearing of Dec. 9 and 10, 1931, filed.

Jan. 25—Motion to continue hearing to March 8, 1932, filed by taxpayer. 1/27/32 granted.

Jan. 26—Stipulation to take depositions of J. M. Holliday, et al., filed.

Feb. 11—Depositions of J. M. Holliday, et al., filed (1). Copies served by notary.

Mar. 8, 9, 10 and 11—Hearing had before Mr. Arundell, Mr. Van Fossan and Mr. Leech—continued to 3/28/32 for oral argument. Petitioner's brief due 3/28/32.

Mar. 15—Transcript of hearing of March 8, 1932, filed. Volume 1.

" 15—Transcript of hearing of March 9, 1932, filed. Volume 2.

" 15—Transcript of hearing of March 10, 1932, filed. Volume 3.

" 15—Transcript of hearing of March 11, 1932, filed. Volume 4.

Mar. 25—Brief filed by General Counsel.

Mar. 26— " " " taxpayer.

Mar. 28—Hearing had before Messrs. Arundell, Van Fossan and Leech on oral argument.

1932

Apr. 4—Order restoring proceeding to the day calendar of 5/16/32 for further hearing on all questions in dispute under the issues as raised by the pleadings, entered.

Apr. 14—Transcript of hearing of March 28, 1932, filed. Volume 5.

Apr. 28—Motion for continuance to June 14, 1932, filed by taxpayer. Granted.

May 31—Motion for continuance to October or November filed by taxpayer. 6/1/32 granted.

July 7—Application for subpoena duces tecum to M. J. McLaughlin filed by General Counsel.

July 7—Subpoena duces tecum to M. J. McLaughlin issued.

July 7—Application for subpoena to H. H. Halleck, et al., filed by General Counsel.

July 7—Subpoenas (3) to H. H. Halleck, et al., issued.

July 7—Application for order to take depositions to M. J. McLaughlin, et al., filed by General Counsel.

July 7—Order to take depositions of M. J. McLaughlin, et al., entered.

July 13—Hearing set Oct. 18, 1932.

July 19—Deposition of Ella S. Tumulty, et al., filed (1). Copies served by notary.

Aug. 5—Deposition of B. H. Stevens, et al., filed (1). Copies served by notary.

Sept. 12—Depositions of M. J. McLaughlin, et al., filed (1). Copies served by notary.

Sept. 22—Application for subpoena to Geo. O. Moody filed by General Counsel.

Sept. 22—Subpoena to Geo. O. Moody issued.

Sept. 22—Application for subpoena to M. H. Smith, et al., (8) filed by General Counsel.

Sept. 22—Subpoenas (8) to M. H. Smith, et al., issued.

1932.

Oct. 7—Deposition of Geo. O. Moody filed (1). Copies served by notary.

Oct. 13—Depositions of Porter Farrell, et al., filed (1). Copies served by notary.

Oct. 18, 19 and 20—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits. Stipulation #12 filed.

Oct. 19—Transcript of hearing Oct. 18, 1932, filed.

" 19— " " " " 19, " "

Oct. 21— " " " of Oct. 20, 1932, filed.

Oct. 24—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Oct. 25—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Oct. 25—Transcript of hearing Oct. 24, 1932, filed.

Oct. 26—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Oct. 26—Transcript of hearing Oct. 25, 1932, filed.

" 27— " " " of " 26, " "

" 28— " " " " " 27, " "

Oct. 27—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Oct. 31—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 1—Application for subpoena to Alfred W. Gieske filed by General Counsel.

Nov. 1—Subpoena to A. W. Gieske issued.

Nov. 1—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 1—Transcript of hearing Oct. 31, 1932, filed.

Nov. 2—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 2—Transcript of hearing Nov. 1, 1932, filed.

" 3— " " " " 2, " "

Docket Entries.

1932

Nov. 3—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 4—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 8—Transcript of hearing of Nov. 4, 1932, filed.

Nov. 10—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 11—Transcript of hearing of Nov. 10, 1932, filed.

Nov. 11—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 12—Transcript of hearing of Nov. 11, 1932, filed.

" 14— " " " " " 24, " " (partial).

Nov. 14—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 15—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 15—Transcript of hearing of Nov. 14, 1932, filed.

" 16— " " " " " 15, " "

Nov. 16—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 17—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 17—Transcript of hearing of Nov. 16, 1932, filed.

" 18— " " " " " 17, " "

Nov. 18—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

Nov. 19—Transcript of hearing of Nov. 18, 1932, filed.

Nov. 21—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

" 22—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits.

" 22—Transcript of hearing of Nov. 21, 1932, filed.

" 23— " " " " " 22, " "

1932

Nov. 23—Hearing had before Messrs. Arundell, Van Fossan and Leech on merits. Briefs to be filed Feb. 1, 1933, and oral argument to be made at a later date to be agreed upon, the case then to stand submitted.

Nov. 24—Transcript of hearing of Nov. 23, 1932, filed.

1933

Feb. 1—Brief filed by General Counsel.

" 1—Findings of fact filed by General Counsel.

" 1—Brief filed by taxpayer.

" 1—Findings of fact filed by taxpayer.

" 1—Analysis of certain data introduced by respondent, filed by taxpayer.

Feb. 2—Recomputation filed by General Counsel.

" 7—Order that oral argument will be heard at 10 a. m., March 2, 1933, entered.

Mar. 2—Hearing had before Messrs. Arundell, Van Fossan and Leech on oral argument.

Mar. 3—Hearing had before Messrs. Arundell, Van Fosson and Leech on oral argument.

Mar. 13—Transcript of hearing of March 2 and 3, 1933, filed.

Aug. 8—Findings of fact and opinion rendered—C. Rogers Arundell, Division 7. Decision will be entered under Rule 50.

Sept. 16—Motion for additional finding of fact filed by General Counsel.

Oct. 14—Motion for leave to withdraw motion for an additional finding of fact filed by General Counsel.

1935 10/16/33 granted.

Feb. 9—Exceptions to certain of Board's findings of fact filed by taxpayer. 2/9/35 copy served on General Counsel.

Feb. 9—Motion to adopt several findings and conclusions set forth in "Proposed Findings of Fact" and to allow petitioner exception to the refusal of such requests as may be denied filed by taxpayer. 2/9/35 copy served on General Counsel.

1935

May 9—Order denying motion filed Feb. 9, 1935, entered.

June 27—Notice of settlement filed by General Counsel.

July 6—Hearing set for July 18 under Rule 50.

13—Objections to respondent's computation filed by taxpayer. 7/15/35 copy served on General Counsel.

17—Request and motion for additional findings filed by General Counsel 7/18/35 denied.

18—Hearing had before Mr. Arundell, Van Fossan and Leech on settlement under Rule 50. Proposed computation by respondent and alternative by petitioner. Deficiencies to be found in accordance with respondent's proposal. Respondent's motion for additional findings denied.

18—Decision entered. C. R. Arundell, Div. 7.

Aug. 2—Transcript of hearing of July 18, 1935, filed.

Aug. 19—Stipulation to correct transcript filed.

Oct. 3—Motion to fix amount of bond in the amount of $3,200,000 filed by taxpayer.

Oct. 3—Stipulation to correct transcript filed.

Oct. 8—Order fixing amount of bond at $3,250,000 entered.

Oct. 15—Supersedeas bond in the amount of $3,250,000 lodged. Order declining to approve said bond, to which ruling petitioner excepts, entered.

Oct. 15—Petition for review by U. S. Cir. Ct. of Ap. 3rd Cir. with assignments of error filed by taxpayer.

Oct. 15—Proof of service filed by taxpayer.

Oct. 23—Agreed statement of evidence lodged (Vol. 1-9).

Oct. 23—Stipulation to send up certain original exhibits filed.

Oct. 24—Agreed statement of evidence approved and ordered filed.

Nov. 5—Certified copy of order from 3rd Cir. consolidating with Dockets 11539 and 30989 for hearing and decision, and for transmission of certain original exhibits, filed.

Petition.

(Filed September 3, 1927.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

The above-named petitioner, M. L. Benedum, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:PA:PYA-60D-WSL) dated July 8, 1927, and as a basis of his proceedings alleges as follows:

1. The petitioner is an individual residing in Pittsburgh, Pennsylvania, with address at Benedum-Trees Building, Fourth Avenue, Pittsburgh, Pennsylvania.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on July 8, 1927.

3. The taxes in controversy are income taxes for the calendar year 1919 and the amount in dispute is $12,007,315.11.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The failure of the respondent to find that no taxable gain resulted from the exchange by the petitioner of stock

in Tex-Penn Oil Company for stock in the Transcontinental Oil Company, when, in connection with the reorganization, merger or consolidation of a corporation, he received in place of the stock of the Tex-Penn Oil Company owned by him, new stock of the Transcontinental Oil Company, of no greater aggregate par or face value.

(b) The failure of the respondent to find that the Transcontinental Oil Company stock had no fair market value when received by the petitioner.

(c) The error on the part of the respondent in determining that the Transcontinental Oil Company stock when received by the petitioner had a fair market value of $47.55 per share.

(d) The action of the respondent in including in income the amount of $2,934,375.00 as a profit on the sale of 6/16 of 5/8 interest in oil leases, when the actual amount received was $1,368,750.00, and which latter amount was reported as income in the original return.

(e) The computation of tax by the respondent in regard to income from the sale of oil and gas wells, the principal value of which was demonstrated by discovery work done by the taxpayer.

5. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) On or about July 24, 1919, the Tex-Penn Oil Company was a corporation of the State of West Virginia, the Riverside Eastern Oil Company was a corporation of the State of Delaware, the Riverside Western Oil Company was a corporation of the State of West Virginia, and the Pittsburg-Texas Oil and Gas Company was a corporation of the State of West Virginia.

(b) On or about July 24, 1919, the Transcontinental Oil Company was organized as a corporation under the laws of the State of Delaware.

(c) On or about July 24, 1919, the Tex-Penn Oil Company, the Riverside Eastern Oil Company, the Riverside Western Oil Company and the Pittsburg-Texas Oil and Gas Company merged and/or consolidated into and with the Transcontinental Oil Company.

(d) On or about July 24, 1919, in connection with the said merger and/or consolidation, the petitioner exchanged certain stock of the Tex-Penn Oil Company then owned by him for stock of the Transcontinental Oil Company.

(e) The stock of the Transcontinental Oil Company so received by the petitioner had no fair market value upon the date so received.

(f) The stock of the Transcontinental Oil Company so received by the petitioner had no par or face value.

(g) The statutes under which the said stock of the Transcontinental Oil Company was issued did not require the corporation to fix in a certificate or on its books of account or otherwise an amount of capital or an amount of stock issued which might not be impaired by the distribution of dividends.

(h) During the year 1919, the petitioner sold 6/16 of 5/8 interest in certain oil and gas leases upon land in Comanche County, Texas, for $1,368,750, and not for $2,934,375 as found by the respondent.

(i) The respondent, in his notice of deficiency, has erroneously computed the limitation of surtax under Section 211(b) of the Revenue Act of 1918.

Petition.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and enter an order that no deficiency exists.

(Sgd.) JOHN O. WICKS,
JOHN O. WICKS,
Counsel for Petitioner,
Park Building,
Pittsburgh, Pennsylvania.

AFFIDAVIT.

STATE OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY, } SS.:

M. L. BENEDUM, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be on information and belief, and those facts he believes to be true.

(Sgd.) MICHAEL L. BENEDUM.
(Sgd.) M. L. BENEDUM.
M. L. BENEDUM.

Subscribed and sworn to before me
the 29th day of August, 1927.

ANNA M. NUERNBERG,
Notary Public.
ANNA M. NUERNBERG, Notary Public
(Seal) My Commission expires
March 7, 1929.

Exhibit A to Petition.

(The deficiency notice, dated July 8, 1927, attached to the original petition, is printed as "Benedum Exhibit B" of the Amended Petition, at pages 2072 to 2075 of this transcript.)

Answer.

(Filed November 5, 1927.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations in Paragraph 1 of the petition.

2. Admits the allegations in Paragraph 2 of the petition.

3. Admits the allegations in Paragraph 3 of the petition.

5(a). Answering the allegations in subparagraph (a) of Paragraph 5, admits that in 1919 there existed the Tex-Penn Oil Company, the Pittsburgh-Texas Oil and Gas

Company, the Riverside Western Oil Company, all corporations of the State of West Virginia, and the Riverside Oil Company, a corporation of the State of Delaware.

5(b). Answering the allegations in subparagraph (b) of Paragraph 5, admits that during the year 1919 the Transcontinental Oil Company was organized under the laws of the State of Delaware.

5(c). Denies the allegations in subparagraph (c) of Paragraph 5.

5(d). Answering the allegations in subparagraph (d) of Paragraph 5, admits that during the year 1919 the petitioner received certain stock of the Transcontinental Oil Company. Denies the remaining allegations in subparagraph (d) of Paragraph 5.

5(e). Denies the allegations in subparagraph (e) of Paragraph 5.

5(f). For lack of information upon which to base a belief denies the allegations in subparagraph (f) of Paragraph 5.

5(g). For lack of information upon which to base a belief denies the allegations in subparagraph (g) of Paragraph 5.

5(h). Answering the allegations in subparagraph (h) of Paragraph 5, admits that during the year 1919 the petitioner sold 6/16 of 5/8 interest in certain oil and gas leases, but denies that the net sale price was less than $2,934,375.00.

5(i). Denies the allegations in subparagraph (i) of Paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore admitted, qualified, or denied.

(Signed) C. M. CHAREST,
General Counsel,
Attorney for Commissioner of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

Motion to Consolidate.

(Filed February 4, 1929.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and informs the Board that the appeal of the Tex-Penn Oil Company is set for hearing on the merits on April 15, 1929; that the appeals of M. L. Benedum and F. B. Parriott are based on the same facts as the appeal of the Tex-Penn Oil Company, but that they have not yet been set for hearing.

WHEREFORE, respondent moves this Honorable Board that the appeals of said individuals, M. L. Benedum and F. B. Parriott, be consolidated for hearing and decision with the appeal of the Tex-Penn Oil Company and that said appeals so consolidated be heard upon April 15, 1929.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

Order.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

On motion of counsel for the respondent and for good cause shown, it is

ORDERED that the above-entitled proceedings be and the same hereby are consolidated with the appeal of Tex-Penn Oil Company, Docket No. 11539. And it is further

ORDERED that the proceedings be placed on the Day Calendar of June 3, 1929, for hearing.

Dated, Washington, D. C., February 5, 1929.

(Signed) B. H. LITTLETON,
Member,
United States Board of Tax Appeals.

Amended Petition.

(Filed April 15, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue (hereinafter referred to as the Commissioner) in his notice of deficiency (IT:PA:PYA-60D-WSL), dated July 8, 1927, and, as a basis of his proceeding, alleges as follows:

1. The petitioner is a citizen of the United States residing in Pittsburgh, Pennsylvania, with address at the Benedum-Trees Building, Pittsburgh.

2. Upon information and belief there was mailed to the petitioner on November 15, 1924, a notice of deficiency (a copy of which is attached hereto and marked Exhibit A), asserting that a determination of petitioner's income tax liability for the years 1919 and 1920 disclosed deficiencies for such years of $996.66 and $717.19, respectively. The petitioner filed no petition for a redetermination of the deficiencies set forth in such notice of deficiency.

3. Upon information and belief a second notice of deficiency (a copy of which is attached hereto and marked Exhibit B) was mailed to the petitioner on July 8, 1927. The original petition herein was duly filed on September 3, 1927.

4. The taxes in controversy are income taxes for the calendar year 1919 and are in the amount of $12,007,315.11.

5. Determination of the tax set forth in said second notice of deficiency is based upon the following errors:

(a) The Commissioner erred in finding that the petitioner derived taxable gain from a transaction in 1919 wherein the Tex-Penn Oil Company (in which the petitioner owned stock) transferred all its assets to the Transcontinental Oil Company, a newly organized company, in exchange for approximately 51 per cent. of the stock of the Transcontinental Oil Company, followed immediately by the distribution to petitioner of Transcontinental stock upon the surrender of petitioner's Tex-Penn stock, such Transcontinental stock so distributed having no greater aggregate par or face value than the petitioner's old Tex-Penn stock.

(b) The Commissioner erred in finding that the aforesaid transfer of Tex-Penn assets to the Transcontinental Oil Company was made in exchange partly for stock of the Transcontinental Oil Company and partly for cash, when in fact the transfer of such assets was made in exchange solely for stock of the Transcontinental Oil Company.

(c) The Commissioner erred in finding that the petitioner's Tex-Penn stock was exchanged partly for stock of the Transcontinental Oil Company and partly for cash, when in fact such Tex-Penn stock was exchanged solely for stock of the Transcontinental Oil Company.

(d) The Commissioner erred in failing to find that where, pursuant to a plan of reorganization involving the merger or consolidation of the Tex-Penn Oil Company and certain other corporations there was organized in 1919 the Transcontinental Oil Company, and the Tex-Penn Oil

Company, as one of the constituent companies, united its properties with those of the other constituents by the transfer of its properties to the Transcontinenal Oil Company in exchange solely for Transcontinental stock, followed by the distribution of such stock to the Tex-Penn stockholders in exchange for their old stock and the dissolution of the Tex-Penn Oil Company, such Transcontinental stock so received and distributed being of no greater aggregate par or face value than the Tex-Penn stock exchanged therefor, no taxable gain was derived by the petitioner from the receipt of such Transcontinental stock in exchange for his old stock.

(e) The Commissioner erred in failing to find that the sole consideration received by the petitioner in exchange for his Tex-Penn stock in the above-described reorganization was Transcontinental stock of no greater aggregate par or face value than the Tex-Penn stock surrendered by petitioner in said reorganization.

(f) The Commissioner erred in finding that the petitioner derived taxable income in 1919 from the receipt in that year of Transcontinental stock, when such stock, at the time it was received by petitioner and at all times during 1919, was subject to a firm and binding agreement made as part of the aforesaid reorganization that such stock would in no event be sold during the existence of a syndicate formed to purchase and market other Transcontinental stock, which syndicate did not terminate until after the close of the taxable year 1919.

(g) The Commissioner erred in failing to find that the aforesaid agreement restricting the sale of such Transcontinental stock was a valid and binding agreement, continuing in effect until after the close of the taxable year 1919, and that pursuant thereto none of the Transcontinental stock so received by the petitioner in 1919 upon said

exchange was sold or disposed of during the life of such agreement.

(h) The Commissioner erred in failing to find that the petitioner derived no taxable gain from the exchange in 1919 of his Tex-Penn stock for stock of the Transcontinental Oil Company, since the Transcontinental stock so received did not have any fair market value or cash equivalency within the meaning of Section 202(b) of the Revenue Act of 1918 and the Regulations of the Treasury Department issued thereunder.

(i) The Commissioner erred in finding that the Transcontinental stock received by the petitioner in 1919 in exchange for his Tex-Penn stock had a fair market value when received of $47.55 a share.

(j) The Commissioner erred in computing the gain, if any, which the petitioner derived from the exchange in 1919 of his Tex-Penn stock for stock of the Transcontinental Oil Company.

(k) The Commissioner erred in computing the amount of the gain, if any, which the petitioner derived from the sale to the Transcontinental Oil Company of his individually owned interest in the Duke-Knoles properties.

(l) The Commissioner erred in determining that the petitioner sold his 6/16 interest in the 5/8 interest individually owned by the five individuals in the Duke-Knoles properties for the net amount of $2,934,375, when in fact petitioner sold such interest for $1,500,000.

(m) The Commissioner erred in determining that the petitioner purchased the individually owned interest of J. L. Kirkland and J. B. Lantz, and one-half of the individually owned interest of W. E. Wrather, in the Duke-Knoles properties.

(n) The Commissioner erred in determining that the petitioner purchased for $1,285,714.28 the stock of the Tex-Penn Oil Company owned by J. L. Kirkland and J. B. Lantz and part of the stock of the Tex-Penn Oil Company owned by W. E. Wrather.

(o) The Commissioner erred in determining the cost or other basis for tax purposes of petitioner's individually owned interest in the Duke-Knoles properties.

(p) The Commissioner erred in determining that the petitioner acquired his individually owned interest in the Duke-Knoles leases without cost.

(q) The Commissioner erred in determining the cost or other basis for tax purposes of petitioner's Tex-Penn stock.

(r) In determining the cost or other basis for tax purposes of petitioner's Tex-Penn stock, the Commissioner erred in failing to include as part of the cost of such stock the petitioner's share of the $350,000 directed by the petitioner and other stockholders of the Tex-Penn Oil Company to be paid to the Tex-Penn Oil Company by the Transcontinental Oil Company out of money due the petitioner from the Transcontinental Oil Company.

(s) In computing the gain alleged to have been realized by the petitioner in 1919 from the exchange of his Tex-Penn stock for Transcontinental stock, the Commissioner erred in failing to reduce such alleged gain by the amount of petitioner's share of additional taxes, if any, alleged to be due from the Tex-Penn Oil Company for 1919.

(t) The Commissioner erred in failing to allow the petitioner a proper limitation upon surtax, if any, pursuant to Section 211 (b) of the Revenue Act of 1918.

(u) The Commissioner erred in computing the gain, if any, derived by the petitioner from the retirement of peti-

tioner's preferred stock of the Riverside Eastern Oil Company.

(v) The Commissioner erred in computing the gain, if any, derived by the petitioner from the retirement of petitioner's preferred stock of the Riverside Western Oil Company.

(w) In computing petitioner's income taxes for 1919, the Commissioner erred in failing to allow as an ordinary and necessary business expense any amount on account of certain shares of the Transcontinental Oil Company which the petitioner in 1919 set aside and applied as compensation for services rendered or to be rendered by certain designated employees of the Transcontinental Oil Company.

6. Upon information and belief, the facts upon which the petitioner relies as the basis for this proceeding are as follows:

(a) During the year 1917 the petitioner and four other individuals acquired certain undeveloped oil and gas leases, some thirty-one in number, on lands located in the State of Texas, known as the Duke-Knoles leases. The said leases entitled the lessees to explore and drill for oil and gas on the properties covered thereby, and upon discovery to extract oil and gas, reserving to the lessors one-eighth of the oil and gas produced from the properties. The names of the individuals and the extent of their respective interests in the said leases were as follows:

M. L. Benedum (the petitioner)	6/16
F. B. Parriott	3/16
J. L. Kirkland	3/16
W. E. Wrather	2/16
J. B. Lantz	2/16

(b) Following the acquisition of these oil and gas leases, in the spring of 1918 drilling operations were begun, and on September 2, 1918, the first well was brought in, known as Duke Well No. 1, with an initial daily production of 600 barrels. The oil fields surrounding this well later became known as the "Duke-Knoles Pool" and was part of the so-called Desdemona Field, which lay chiefly in Comanche and partly in Erath and Eastland counties, Texas. The initial work in developing the leases was directed by F. B. Parriott, acting as agent for the five interested persons. But this method of carrying on the project was found both inconvenient and undesirable. Accordingly, on or about October 31, 1918, the five above-named individuals caused the Tex-Penn Oil Company to be incorporated under the laws of West Virginia, with a capitalization of $2,000,000, consisting of 80,000 shares of common stock of a par value of $25 per share. Upon the incorporation of the Tex-Penn Oil Company, the five individuals transferred to it their respective interests in the properties covered by the thirty-one oil and gas leases, including the wells and oil already produced and in tanks, reserving, however, unto themselves a five-eighths interest in all the oil, gas and gasoline already or thereafter produced on such leaseholds in accordance with their respective interests. Under the agreement of transfer the Tex-Penn Oil Company undertook to develop and maintain the properties and to pay the cost thereof, subject, however, to an agreement upon the part of the transferors that if the income of the Tex-Penn Oil Company from its operation of the leases was not sufficient to pay the costs of development and other charges, the individual transferors would apply one-half of their receipts arising from their reserved five-eighths interest under semi-annual settlements to meet the deficit. In exchange for this transfer of interest in the leases to the Tex-Penn Oil Company the

five individuals received all of the then issued stock of the Tex-Penn Oil Company, to wit: 4,000 shares, distributed in accordance with their respective interests in the leaseholds. The agreement gave the five individuals options to take up any and all additional stock of the Tex-Penn Oil Company which might be issued, while the Tex-Penn Oil Company on its part had a right, if and when all of its authorized stock was acquired by the said individuals, to purchase from such individuals for a nominal consideration the reserved five-eighths interest of the individuals.

(c) Following this transaction in October, 1918, the Tex-Penn Oil Company proceeded to drill additional wells. A well known as "Knoles Well No. 1," located about 800 feet southwest of "Duke Well No. 1," was brought in on December 20, 1918, with an initial daily production of 500 barrels of oil. This well was later deepened and in January, 1919, it was producing daily 6,000 barrels of oil. In addition, between October 31, 1918, and July 1, 1919, the Tex-Penn Oil Company drilled a total of nine wells on various tracts composing the thirty-one leases. Of this number five produced oil and four produced gas. The initial production of the oil wells varied from 600 barrels per day to 15 barrels per day. In drilling these nine wells the Tex-Penn Oil Company expended some $228,000. The several stockholders of the Tex-Penn Oil Company supplied this amount by purchasing an additional 9,120 shares of its stock for cash at par, allocated in accordance with their respective interests in the leaseholds.

(d) Messrs. Benedum and Parriott were also interested in some or all of the following oil companies, namely, the Riverside Eastern Oil Company, Riverside Western Oil Company and the Pittsburgh-Texas Oil & Gas Company. Both Benedum and Parriott owned common and preferred stock of the two Riverside Companies. The Riverside Eastern and Riverside Western Companies and their

wholly owned subsidiaries were engaged chiefly in the manufacture of gasoline and the marketing of refined oil products. The Pittsburgh-Texas Company owned undeveloped oil and gas leases in Texas and a refinery located at Boynton, Oklahoma. These properties, if combined with the oil and gas producing Duke-Knoles leases, would, it was believed, constitute a workable unit, including producing, refining and distributing facilities. In the spring of 1919 plans were discussed for uniting these several properties in a single corporation.

(e) With this in view, the petitioner was authorized in writing by the aforesaid individuals to sell the entire leasehold interests in the Duke-Knoles properties for $12,000,000 in cash. Later, and before any sale was accomplished, three of the individuals, namely, J. L. Kirkland, W. E. Wrather and J. B. Lantz, sold their stock in the Tex-Penn Oil Company to Messrs. Benedum and Parriott for a nominal consideration, subject, however, to the condition that such stock would be returned in the event the contemplated consolidation of properties did not materialize; and at the same time the five individuals and the Tex-Penn Oil Company prepared and signed a document assigning all their respective individually owned interests in the Duke-Knoles properties to a newly organized company known as the Transcontinental Oil Company, and deposited such document with F. B. Parriott in escrow. It was a condition of the delivery of this assignment out of escrow that J. L. Kirkland, W. E. Wrather and J. B. Lantz should first receive in cash their proportionate share of the stated consideration of $12,000,000.

(f) Upon acquiring the three aforesaid individuals' interest in the stock of the Tex-Penn Oil Company, Messrs. Benedum and Parriott transferred to the Tex-Penn Oil Company their rights under a certain contract with

L. Restrepo and J. W. Leonard covering an option to purchase 4,832 acres of undeveloped land in fee and undeveloped oil and gas leases on some 800,000 acres in Colombia, South America. At the same time Messrs. Benedum and Parriott transferred to the Tex-Penn Oil Company certain oil and gas rights covering undeveloped property in Oldham and Sutton Counties, Texas. In consideration for the transfer of such Columbia and Texas properties to the Tex-Penn Oil Company, the Tex-Penn Oil Company issued to Messrs. Benedum and Parriott its remaining authorized but unissued stock.

(g) In the meantime and directly upon Benedum having secured authority to sell the several interests in the Duke-Knoles properties for $12,000,000 in cash, negotiations were entered into with certain New York and Philadelphia bankers with a view of financing the proposed consolidated company, to which the several properties hereinabove referred to would be transferred. Suggestion was made that the bankers furnish $23,000,000 in cash, receiving in exchange a block of stock of the proposed company. The bankers were not, however, able to raise this amount of money. About the middle of June they advised Benedum that they would be in a position to furnish $20,000,000 if the deal were put through shortly. Benedum's authority to sell out the interests of the five individuals in the Duke-Knoles properties for $12,000,000 expired on July 15, 1919. In order to close the deal and at the same time meet the bankers' reduced figure, it was necessary that a recession of $3,000,000 in cash be made. Benedum decided to take up this $3,000,000 recession out of his own share of the sales price of $12,000,000 in order to close with the bankers and at the same time be within his authority under the sales agreement with the five individuals.

(h) On or about June 28, 1919, a company known as Transcontinental Oil Company was organized under the laws of the State of Delaware with a capital stock of 2,000,000 shares of no par value. Upon the organization of the company, Mr. Benedum became the Chairman of the Board of Directors and Mr. Parriott became President and a director. Under the laws of Delaware, the corporation was not required to fix in its corporate certificate or on its books or otherwise an amount of capital or an amount of issued stock which might not be impaired by a distribution of dividends.

(i) Following the organization of this new corporation and on or about August 1, 1919, pursuant to a plan of consolidation or merger there was transferred to the Transcontinental Oil Company all the assets of the Tex-Penn Oil Company, all the individually held interests of the five individuals in the Duke-Knoles properties, all the assets of Riverside Eastern Oil Company and its subsidiaries, all the assets of Riverside Western Oil Company and its subsidiary, and all the assets of Pittsburgh-Texas Oil & Gas Company. As part of the plan of reorganization the bankers entered into an agreement to purchase 500,000 shares of Transcontinental stock at $40 a share, acquired an option to purchase an additional 225,000 shares at $1 a share, which option was later exercised, and were given a bonus of 25,000 shares of Transcontinental stock as a bankers' commission.

(j) In exchange for the assets so transferred, the Tex-Penn Oil Company received 1,007,834 shares of no par stock of the Transcontinental Oil Company; Messrs. Benedum, Pariott, Kirkland, Wrather and Lantz received in consideration for the transfer of their individually owned interest in the Duke-Knoles properties cash aggregating $9,000,000 allocated as follows: To M. L. Benedum $1,500,000; to F. B. Parriott $2,250,000; to J. L. Kirkland

$2,250,000; to W. E. Wrather $1,500,000; to J. B. Lantz $1,500,000; Riverside Eastern received 41,666 shares of Transcontinental stock and $1,250,000 in cash; Riverside Western received 41,667 shares of Transcontinental stock and $1,250,000 in cash; and the Pittsburgh-Texas Company received 158,333 shares of Transcontinental stock. Pursuant to the bankers' agreement, the bankers immediately received a block of Transcontinental stock for which they paid $12,070,000. Later, and from time to time, additional Transcontinental stock was issued to the bankers against payment of cash, and ultimately the bankers acquired 750,000 shares, for which they paid an aggregate of $20,225,000.

(k) As part of the plan of merger or consolidation, the Tex-Penn Oil Company, the Riverside Eastern, Riverside Western and the Pittsburgh-Texas companies distributed the Transcontinental stock and cash so received, respectively, by such companies to their respective stockholders in accordance with their stockholdings, the common stockholders of the several companies receiving Transcontinental stock on the surrender of their old stock, and the preferred stockholders of the two Riverside Companies being paid off in cash at par. Immediately thereafter steps were taken looking to the dissolution of the four aforesaid companies, and such companies ultimately were dissolved. In this manner Messrs. Benedum and Parriott received in 1919 1,007,834 shares of Transcontinental stock on distribution in exchange for the surrender of their stock of the Tex-Penn Oil Company.

(l) Of the 1,007,834 shares of Transcontinental stock so received, 623,959 shares went to Mr. Benedum, 284,375 shares went to Mr. Parriott and the balance, constituting 99,500 shares, were placed in a so-called joint account for distribution to certain employees and associates. Of this

block of 99,500 shares, Mr. Benedum contributed 59,078 shares and Mr. Parriott contributed 40,422 shares.

(m) Within the taxable year 1919, Mr. Benedum in the course of his business operations set aside and applied 24,640 shares of the said 59,078 shares as compensation for services rendered or to be rendered by designated employees of the Transcontinental Oil Company.

(n) As part of the aforesaid merger or consolidation, it was agreed that Tex-Penn Oil Company assets transferred to the Transcontinental Oil Company should pass free and clear of any and all liabilities. The estimated net current liabilities of the Tex-Penn Oil Company at that time amounted to approximately $350,000. In order to meet these liabilities and so free the assets, the five aforesaid individuals agreed to provide the Tex-Penn Oil Company with the needed cash. To this end the five individuals, at the time they sold their individually owned interests in the Duke-Knoles properties to the Transcontinental Oil Company, directed the Transcontinental Oil Company to deduct and withhold from the cash payment to which each was entitled an amount equivalent to that part of $350,000 which each such respective interest in the leasehold properties bore to the aggregate amount of $350,000 and directed the Transcontinental Oil Company to pay over such amounts on their behalf to the Tex-Penn Oil Company for the purposes indicated. This was done, and at the time the 1,007,834 shares of Transcontinental stock was delivered, Transcontinental Oil Company paid over to the Tex-Penn Oil Company $350,000, having first deducted such amount in the aggregate from the cash payments made to the five individuals in consideration for the transfer of the individually owned interests. This $350,000 so received was used by the Tex-Penn Oil Company to pay off its net current liabilities. No part of this $350,000 so paid over to the Tex-Penn Oil Company by

the Transcontinental Oil Company constituted directly or indirectly any part of the consideration received by the Tex-Penn Oil Company for the sale of its assets to the Transcontinental Oil Company as aforesaid.

(o). As part of the aforesaid plan of consolidation or merger, the bankers agreed to form and organize a syndicate to purchase and market the 500,000 shares of the Transcontinental stock which the bankers had agreed to purchase at $40 per share. At the same time and as a condition of the bankers' agreement to purchase, an agreement was entered into with such bankers pursuant to which it was agreed that none of the 1,007,834 shares of Transcontinental stock received by Messrs. Benedum and Parriott through distribution from the Tex-Penn Oil Company would be marketed, sold or disposed of directly or indirectly so long as the banking syndicate should remain in existence. The syndicate was organized some time in July or August, 1919, for a period of three months, with the option on the part of the syndicate to extend its duration for further periods. Thereafter the syndicate was extended another period of three months, and did not terminate until early in 1920. Throughout this entire period the restrictive agreement against the sale of Transcontinental stock remained in effect and unmodified, and none of such stock so subject to such restrictive agreement was in fact sold or offered for sale or otherwise disposed of until after the termination of the syndicate in 1920.

(p) Upon the organization of the Transcontinental Oil Company further development work in the lands covered by the Duke-Knoles leases was undertaken. During the summer and fall of 1919 additional wells were drilled. Substantially all of such wells either had little or no initial production and shortly went dry, or proved to be dry from the outset, and none were ever commercially productive. Shortly after the merger or consolidation, there

was an unprecedented decline in the production of the Duke-Knoles wells. In spite of the expenditure of large additional sums of money in exploration and development, no oil in paying quantities was thereafter found on the Duke-Knoles properties, nor upon any of the other properties conveyed to the Transcontinental Oil Company on its organization. In fact, in the fall of 1919, it was evident that further drilling operations on the Duke-Knoles leases should not be continued on account of the demonstrated absence of oil in commercial quantities, and that such leases were of relatively little value. For six years following its organization, the Transcontinental Oil Company made no net earnings whatsoever, but in fact sustained enormous current losses. These losses were met by heavy bank borrowings and by personal loans of cash and securities made to the company by Messrs. Benedum and Parriott, individually.

WHEREFORE, the petitioner prays that this Board may hear these proceedings and determine:

(1) That the transaction in 1919 whereby the petitioner surrendered his Tex-Penn stock in exchange solely for stock of the Transcontinental Oil Company did not give rise to any taxable gain;

(2) That the Transcontinental stock received by the petitioner in 1919 did not when received have any ascertainable fair market value or cash equivalency within the meaning of Section 202(b) of the 1918 Revenue Act, but if it had such a value the value was not $47.55 a share, but nominal only;

(3) That the fair market value, if any, of the Transcontinental stock received by the petitioner in 1919 in exchange for his Tex-Penn stock was less than the basis of such Tex-Penn stock for tax purposes;

(4) And finally that there is no deficiency in the petitioner's income and profits taxes for 1919, and for such other and further relief as to the Board may seem proper.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
HORACE A. MANN,
J. C. ADAMS,
Attorneys for the Petitioner,
15 Broad Street,
New York City.

STATE OF ARIZONA,
COUNTY OF MARICOPA, } ss.:

M. L. BENEDUM, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

M. L. BENEDUM.

Subscribed and sworn to before me
this 17th day of March, 1931.

MARILYN P. GREGG,
Notary.
My commission expires November 29, 1934.

(Notarial Seal)

Benedum Exhibit A

Form NP-2

TREASURY DEPARTMENT
WASHINGTON

Office of
COMMISSIONER OF INTERNAL REVENUE

Address reply to
Commissioner of Internal Revenue
and refer to IT:PA:5
ATH-505

Nov 15 1924

Mr. M. L. Benedum,
1507 Benedum-Trees Building,
Pittsburg, Pennsylvania.

Sir:

The determination of your income tax liability for the years 1919 and 1920, as set forth in office letter dated January 22, 1924, discloses a deficiency in tax amounting to $1,713.85.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:5 ATH-505. In the event that you acquiesce in a part of the determina-

tion, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By J. G. BRIGHT,
Deputy Commissioner.

Enclosures:
Statements
Agreement—Form A

IT:PA-5
ATH-505

Nov 15 1924

STATEMENT

In re: Mr. M. L. Benedum,
1507 Benedum-Trees Building,
Pittsburgh, Pennsylvania.

Year	*Deficiency in Tax*
1919.....	$ 996.66
1920.....	717.19
Total.....	$1,713.85

1919

Corrected net income as shown by Revenue Agent.....		$1,576,032.25
Less:		
Disallowance of leases by Revenue Agent restored, in accordance with agreement reached in conference January 10, 1922.....	$10,309.54	
Disallowance of depletion on oil leases sold restored	56,250.00	66,559.54
Corrected net income.....		$1,509,472.71
Less:		
Dividends	$67,063.36	
Liberty Bond interest.....	1,684.28	
Personal Exemption.....	2,000.00	70,747.64
Amount subject to normal tax.....		$1,438,725.07

Exhibit A to Amended Petition.

Computation of Taxes

Tax on $4,000.00 at 4%		$ 160.00
Tax on $1,434,725.07 at 8%		114,778.01
Surtax		359,020.22
Total		$ 473,958.23
Less:		
Tax paid at source	$ 387.50	
Tax previously assessed	472,574.07	472,961.57
Additional tax due		$ 996.66

The surtax for the year 1919 is computed as follows:

Total net corrected income	$1,509,472.71
Profit from sale of oil properties	$1,368,750.00
Percentage of profit from sale of oil properties to total income	.9067746%
Surtax on $1,509,472.71	$ 914,667.26
Surtax applicable to sale of oil properties (.9067746% of $914,667.26)	$ 829,397.04
20% limitation	273,750.00
Excess of limitation	$ 555,647.04
Total surtax on all income	$ 914,667.26
Less: Excess of limitation	555,647.04
Surtax for 1919	$ 359,020.22

The action of the Income Tax Unit in assessing surtax under Article 13, Regulations 45, has been sustained by the Committee on Appeals and Review in their brief dated September 7, 1922.

1920

Additional tax due as outlined in detail in letter dated February 10, 1922	$717.19

If you protest against the determination of the deficiency, the Bureau desires to proceed in the regular manner to the consideration of any information submitted by you. However, the statutory period within which the Commissioner may assess additional taxes for the year

involved will expire presently, and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office the enclosed form of waiver.

Benedum Exhibit B.

Form NP-2

TREASURY DEPARTMENT
WASHINGTON

Office of
COMMISSIONER OF INTERNAL REVENUE

IT:PA:PYA-60D
WSL

Jul 8 1927

Mr. M. L. Benedum,
Benedum-Trees Building,
Pittsburgh, Pennsylvania.

Sirs:

The determination of your income tax liability for the year 1919, as set forth in office letter dated January 8, 1926, has been changed to disclose a deficiency of $12,007,315.11, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an

assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-60D-WSL. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A

Exhibit B to Amended Petition.

IT:PA:PYA
WSL

STATEMENT

Jul 8 1927

In re: Mr. M. L. Benedum,
Benedum-Trees Building,
Pittsburgh, Pennsylvania.

Year	*Deficiency in Tax*
1919 (Waiver)	$12,007,315.11

The report of the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, dated June 25, 1927, a copy of which was furnished you, covering an examination of your books of account and records, has been reviewed in this office in connection with information presented at a conference held in this office August 13, 1926.

At this conference it was stated that the adjustments in the agent's prior report were acquiesced in and that your protest would deal only with the matter of the value of the stock of the Transcontinental Oil Company, received in liquidation of the Tex-Penn Oil Company.

In this connection, you are advised that at a conference held in this office August 26, 1925, on the Tex-Penn Oil Company, the Bureau held that the findings of the conference held May 21, 1925, should be sustained, wherein it was determined that the fair value of the stock in question at the date of liquidation was $47.55 per share, based upon actual sales. It is, therefore, held that the information submitted at a conference held in this office August 13, 1926, relative to your individual case, is insufficient to change the value of the stock as noted above. Accordingly, the supplemental report dated June 25, 1927, has been approved except as follows:

In the earlier report dated January 29, 1925, a deduction for bad debts was allowed in the sum of $186,009.62 to which no exception was made in your various protests.

In this amount there was included the sum of $86,863.55, representing Tex-Penn expenses. In the later report allowance was made for these expenses under Schedule 1-a (4) and, therefore, bad debts have been corrected to $99,146.07, instead of $109,455.61, as shown in the last report.

The adjustment of this item results in a taxable net income of $18,990,106.99, disclosing a deficiency as shown above.

The computation of tax follows:

Net income corrected		$18,990,106.99
Exemption	$ 2,000.00	
Dividends	67,063.36	
Interest on U. S. Obligations	1,684.28	70,747.64
Subject to normal tax		$18,919,359.35
Subject to normal tax at 4%		4,000.00
Subject to normal tax at 8%		$18,915,359.35
Normal tax at 4%		$ 160.00
Normal tax at 8%		1,513,228.75
Surtax		12,277,079.54
Total tax		$13,790,468.29

Proportion of income from sale of discovery oil property against total net income

$2,934,375.00 divided by $18,990,106.99 = 15.4521%

15.4521% of $12,277,079.54 = $1,897,066.61 Surtax

20% sale price = 586,875.00

Excess surtax to be deducted $1,310,191.61

Total tax shown above		$13,790,468.29
Less: Excess surtax		1,310,191.61
		$12,480,276.68
Tax paid at source	$ 387.50	
Previously assessed	472,574.07	472,961.57
Deficiency		$12,007,315.11

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Answer to Amended Petition.

(Filed May 15, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, against COMMISSIONER OF INTERNAL REVENUE. Respondent.	Docket No. 30990

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition herein, admits and denies as follows:

1. Admits the allegations of paragraph 1 of the amended petition.

2. Admits the allegations of paragraph 2 of the amended petition.

3. Admits the allegations of paragraph 3 of the amended petition.

4. Admits that the taxes in controversy are income taxes for the calendar year 1919, but denies that the amount in controversy is $12,007,315.11, but alleges that the amount in controversy is in excess of that sum.

5. (m) Admits that the Commissioner erred in determining that petitioner purchased the additional, or overriding, royalty of J. L. Kirkland and J. B. Lantz, and one-half of the additional, or overriding, royalty of W. E. Wrather in the Duke-Knoles properties.

(n) Denies that the Commissioner erred in determining that petitioner acquired stock of the Tex-Penn Oil Company from J. L. Kirkland, J. B. Lantz and W. E. Wrather, but admits that the Commissioner erred in determining the amount of the consideration given by petitioner therefor.

(s) Denies that the Commissioner, in his determination of petitioner's tax liability for the year 1919, failed to reduce petitioner's gain by petitioner's share of the tax determined to be due from the Tex-Penn Oil Company for the year 1919, but admits that the Commissioner erred in so reducing petitioner's gain.

(t) Admits that the Commissioner erred in computing petitioner's tax in accordance with Section 211(b) of the Revenue Act of 1918 and in allowing petitioner any limitation of surtax in accordance with said section.

Denies that the Commissioner erred as set forth in paragraph 5 of the amended petition, except as error is hereinabove confessed.

6. Admits that in the year 1919 the petitioner exchanged all of the stock of the Tex-Penn Oil Company owned by him, and 6/16ths of a 5/8ths overriding royalty in the Duke-Knoles properties, owned by him, and received in exchange $1,368,750.00 in cash and 683,037.125 shares of the stock of the Transcontinental Oil Company, and that the Commissioner determined that said Transcontinental Oil Company stock, at the time of said exchange, had a fair market value of $47.55 per share.

Denies all the allegations of paragraph 6 of the amended petition except as hereinabove admitted.

7. Denies each and every allegation of fact contained in said amended petition not hereinbefore specifically admitted, qualified or denied.

ADDITIONAL DEFENSE.

And as additional defense, and confessing that the Commissioner erred as hereinabove admitted, the respondent admits and alleges as follows:

8. Admits that in the deficiency notice, mailed to petitioner July 8, 1927, the Commissioner determined that the petitioner did purchase overriding royalty from Kirkland, Lantz and Wrather, and upon the disposition thereof to the Transcontinental Oil Company sustained a loss, which was allowed by said deficiency notice as a deduction from income. As hereinabove confessed, the Commissioner erred in such determination, no such purchase and sale occurred. Respondent now alleges that no such loss was sustained; that said deduction of said loss was erroneously allowed, and that petitioner's income for the year 1919 was accordingly understated.

9. Admits that in the deficiency notice mailed to petitioner on July 8, 1927, the Commissioner determined that petitioner purchased stock of the Tex-Penn Oil Company from Kirkland, Lantz and Wrather for $1,285,714.28, and upon disposition of said stock allowed a deduction of said sum from the consideration received, as the cost basis of said stock. As hereinbefore confessed, the Commissioner erred in determining the amount of the consideration given by petitioner for said stock and now alleges that said deduction of said cost basis from the consideration received by petitioner upon the disposition of said stock was erroneously allowed and petitioner's income for the year 1919 was accordingly understated.

10. Alleges that the Tex-Penn Oil Company in its appeal to this Board, Docket No. 11539, has denied the tax liability as determined by the Commissioner in the deficiency notice on which its said appeal is based; alleges that petitioner has not admitted the tax liability of the

Tex-Penn Oil Company as so determined or in any amount, and has not admitted petitioner's liability as transferee of the assets of said Tex-Penn Oil Company for the tax of said Company for the year 1919 in the amount as determined by the Commissioner or in any amount, and alleges that in such case petitioner is not entitled to said reduction of his gain by his proportion of the tax of the Tex-Penn Oil Company and that because of said erroneous reduction petitioner's income for the year 1919 was understated by the amount of said reduction so allowed.

11. Admits that the deficiency notice, mailed to petitioner on July 8, 1927, allowed to the petitioner the benefit of the limitation of surtax by the application of Section 211(b) of the Revenue Act of 1918, but alleges that petitioner is not entitled to the benefit of said limitation and that in said deficiency notice petitioner's tax, because of the application of said limitation, was understated.

The respondent hereby asserts an increase in the deficiency as determined by said deficiency notice on account of the understatement of petitioner's income for the year 1919 as alleged in paragraphs 8, 9 and 10 herein, and the limitation of surtax as alleged in paragraph 11 herein.

WHEREFORE, the respondent prays that the deficiency herein be redetermined in the sum of $24,160,673.77.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
OTTAMAR HAMELE,
JOHN D. FOLEY,
BROOKS FULLERTON,
Special Attorneys,
Bureau of Internal Revenue.

5/12/31

M. L. BENEDUM

1919

Recomputation of Tax

Part I—In accordance with Answer to Amended Petition.

Part II—Comparison with Formal Notice of Deficiency.

Deficiency revised.....	$24,160,673.77
Deficiency in formal notice...	12,007,315.11
Increase in deficiency.....	$12,153,358.66

PART I

Schedule 1

Net Income—Year 1919

Net income as disclosed by return.....		$ 1,507,921.24
As corrected.....		33,843,760.48
Net adjustment.....		$32,335,839.24
Unallowable deductions and additional income:		
(a) Profits on sales.....	$32,327,596.43	
(b) Interest on tax free bonds.....	250.00	
(c) Interest on tax free bonds paid by debtor corporation.....	5.00	
(d) Taxable interest on U. S. obligations	850.00	
(e) Bad debts and other deductions overstated	97,872.89	
Total.....		$32,426,574.32
Nontaxable income and additional deductions:		
(f) Interest, bonds and mortgages overstated	$ 253.33	
(g) Rents and royalties overstated.....	90,481.75	
Total.....		90,735.08
Net adjustments as above.....		$32,335,839.24

Explanation of Items Changed

(a)	Profits on sales, increased		$32,327,596.43
	Selling price of 6/16 and 5/8 of production from Duke-Knoles pool and your share of Tex-Penn Oil Company stock:		
	Received:		
	Cash		$ 1,368,750.00
	Transcontinental Oil Company stock—683,037.125 shares at $47.55		32,478,415.29
	Total received		$33,847,165.29
	Cost: Tex-Penn stock—		
	Cash paid for stock 6/16 of $328,000.00	$123,000.00	
	Paid Wrather, Lantz and Kirkland for stock	15.00	
	South American and West Texas oil lands, 3/4 of $100,000.00	75,000.00	
	Total costs		198,015.00
	Profit realized		$33,649,150.29
	Profit on retirement of preferred stock Riverside Western Oil Company—5,589 shares at $25.00	$139,725.00	
	Cost 5,589 shares at $15.00	83,835.00	
	Profit		55,890.00
	Profit on retirement of preferred stock of Riverside Eastern Oil Company—11,900 shares at $5.00	$59,500.00	
	Cost 11,900 shares at $3.50	41,650.00	
	Profit		17,850.00
	Profit Penn-Mex as reported		400.00
	Profit Und. a/c Tropical Oil as reported		2,133.40
	Profit Tropical Oil Co. as reported		44.80
	Profit Riverside Western debentures as reported		360.00
	Profit Riverside Eastern debentures as reported		785.00
	Total		$33,726,613.49
	Loss: Mfg. Light and Heat Co. bonds		780.83
	Total profits from sales		$33,725,832.66
	Profits reported on return		1,398,236.23
	Adjustment—addition to income		$32,327,596.43
(b)	Interest on tax-free bonds received		$ 19,375.00
	As reported		19,125.00
	Adjustment—addition to income		$ 250.00

(c) Interest on tax-free bonds paid by debtor corporations—		
As corrected		$ 387.50
As reported		382.50
Adjustment—addition to income		$ 5.00
(d) Taxable interest on bonds and obligations of the United States—		
As corrected		$ 1,684.28
As reported		834.28
Adjustment—addition to income		$ 850.00
(e) Bad debts and other deductions overstated		$ 97,872.89
This amount is composed of the following:		
Benedum Coal Company		$ 549.80
Water Power Company plant		5,282.34
Steel City Oil and Gas Company		5,027.20
General expense—gifts		150.00
Expenses, Tex-Penn Oil Company		86,863.55
Total		$ 97,872.89

The item "Expenses, Tex-Penn Oil Co." is disallowed as a deduction under this heading, but is allowed as an offset against royalties received, thereby reducing income.

(f) Interest received overstated		$ 253.33
Interest reported on return		$ 49,022.78
Interest received—		
On bonds and mortgages	$27,656.29	
On bank deposits	21,113.16	48,769.45
Adjustment—reduction in income		$ 253.33
(g) Rents and royalties reported		$ 179,887.27
As corrected		89,405.52
Adjustment in income		$ 90,481.75

This item is made up of the following:

Assessment to pay obligations of Tex-Penn Oil Company in accordance with contract:	
6/16 of $231,636.05	$ 86,863.52
6/16 of $ 9,648.61	3,618.23
Total	$ 90,481.75

The item of $86,863.50 was deducted on the return under "Bad Debts." It has been eliminated from this heading and allowed as an offset against royalties received.

SCHEDULE 2

Computation of Tax—Year 1919

Total net income as corrected		$33,843,760.48
Less:		
Exemption	$ 2,000.00	
Dividends	67,063.36	
Interest on United States obligations	1,684.28	70,747.64
Net income subject to normal tax		$33,773,012.84
Subject to normal tax at 4%		4,000.00
Subject to normal tax at 8%		$33,769,012.84

Tax

Normal tax at 4%		$ 160.00
Normal tax at 8%		2,701,521.03
Surtax on $33,843,760.48		21,931,954.31
Total tax assessable		$24,633,635.34
Tax paid at source	$ 387.50	
Tax previously assessed	472,574.07	472,961.57
Deficiency in tax		$24,160,673.77

PART II

Explanation of Changes from 60-Day Letter

	60-Day Letter	*Revised Computation*
Profits on sales	$18,781,697.42	$33,725,832.66
Rents and royalties	179,887.27	89,405.52
Interest on tax-free bonds	19,375.00	19,375.00
Other income	66,682.88	66,682.88
Total	$19,047,642.57	$33,901,296.06
Deductions:		
Interest	$ 4,169.46	$ 4,169.46
Taxes	14,511.26	14,511.26
Donations	8,456.43	8,456.43
Bad debts, etc.	99,146.07	99,146.07
Total	$ 126,283.22	$ 126,283.22
Income—Normal tax	$18,921,359.33	$33,775,012.84
Dividends	67,063.36	67,063.36
Interest on U. S. obligations	1,684.28	1,684.28
Income—Surtax	$18,990,106.99	$33,843,760.48
Net increase in income	$14,853,653.49	

Income increased over 60-day letter		$14,853,653.49
Profits on sales increased		$14,944,135.24
Rents and royalties decreased		90,481.75
Net increase as above		$14,853,653.49

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Profits on sales increased		$14,944,135.24
Increases:		
Loss on purchase of Wrather, Lantz and Kirkland's interests eliminated		$ 279,910.72
Costs of Tex-Penn stock decreased		16,229,849.52
Total		16,509,760.24
Cash received—decreased		1,565,625.00
Net increase in profits as above		$14,944,135.24

The decrease in amount received from rents and royalties is composed of payments made to discharge obligations of Tex-Penn Oil Company:

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6/16 of $231,636.05	$ 86,863.52
6/16 of $ 9,648.61	3,618.23
Total	$ 90,481.75

Decrease in costs of Tex-Penn stock		$16,229,849.52
Computed as follows:		
Decreases:		
Elimination of amounts allegedly paid to the three associates—		
Wrather		$ 214,285.71
Lantz		642,857.14
Kirkland		428,571.43
Elimination of Tex-Penn assessment		86,863.50
Elimination of pro-rata share of Tex-Penn Oil Company tax liability		14,949,360.34
Total		$16,321,938.12
Increases:		
Development cost—		
6/16 of $328,000.00	$123,000.00	
Used by Revenue Agent	105,911.40	
Net increase	$ 17,088.60	
South American and West Texas Oil Lands, ¾ of $100,000.00	75,000.00	92,088.60
Net decrease as above		$16,229,849.52

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Motion to Strike Out Additional Defense.

(Filed May 20, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

Now comes the petitioner, M. L. Benedum, by counsel, and respectfully moves that an order be entered striking out as wholly improper pleading and not in conformity with the Board's rules the so-called "Additional Defense" set up in paragraphs 8, 9, 10 and 11 of the answer filed herein on May 15, 1931, and further requiring that paragraphs four to seven, inclusive, of the answer be made more definite and certain as required by Rule 14. In support, the petitioner alleges as follows:

1. Paragraphs 8, 9, 10 and 11 of the answer under the caption "Additional Defense" apparently purport to set up affirmative relief, since the respondent asserts an increase in the amount of the deficiency. Such paragraphs of the answer do not meet the requirements of Rule 14, since the facts supporting the additional deficiency are not properly alleged.

2. The language in paragraphs 8, 9, 10 and 11 is so vague and indefinite as to make it impossible for the petitioner to make proper reply, as required by Rule 15 of the Board's rules.

3. The answer in paragraphs 4 to 7, inclusive, does not fully and completely advise the petitioner and the Board

of the nature of respondent's defense as required by Rule 11 of the Board's rules.

4. The answer in paragraphs 4 to 7, inclusive, is not responsive to the petition in that it does not contain a specific admission or denial of each material allegation of fact in the amended petition as required by Rule 14 of the Board's rules.

5. Paragraph 6 of the answer is wholly indefinite and uncertain, is not responsive to the amended petition and leaves the petitioner and the Board wholly ignorant of the respondent's defense, in that it fails to admit, deny or allege to whom the petitioner transferred the stock of the Tex-Penn Oil Company and what was the consideration received in exchange for such transfer, and in that it fails to admit, deny or allege to whom the petitioner transferred his interest in the so-called 5/8ths overriding royalty in the Duke-Knoles properties and what was the consideration received for such transfer.

The petitioner further moves that an order be entered striking out the so-called "Recomputation of Tax" unless said "Recomputation of Tax" is formally incorporated in the answer and accompanied or supported by averments of fact as required by Rule 14. In support, the petitioner alleges as follows:

1. The "Recomputation of Tax" consisting of Part 1 and Part 2 filed with the answer is wholly improper pleading and not in conformity with the Board's rules in that it undertakes to recompute the petitioner's taxes on the basis of new facts which are not pleaded affirmatively and by adopting a method of determination wholly inconsistent with the method used in the notice of deficiency attached to the petition herein as Exhibits A and B.

2. The aforesaid "Recomputation of Tax" is not formally incorporated as part of the answer, and petitioner is wholly unable to determine whether he is required under the Board's rules to make reply thereto.

3. If considered as part of the answer, such schedules are wholly improper pleadings in that they do not comply with Rule 14 and do not permit the petitioner to make proper reply thereto as required by Rule 15.

It is respectfully requested that this motion be set down for an early hearing, preferably during the week of May 18th, since under Rule 15 of the Board's rules the petitioner is required to make reply in respect of any affirmative relief set up by the Commissioner in his answer within 45 days of the mailing of such answer.

JOHN W. DAVIS,
M. B. ANGELL,
HORACE MANN,
J. C. ADAMS.

Receipt of copy of the foregoing motion acknowledged this 18th day of May, 1931.

(s) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Order.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

M. L. BENEDUM, Petitioner. vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

This proceeding came on for hearing on May 21, 1931, before Division #7, on motion of the petitioner to require the respondent's answer to be made more definite and certain and further to strike portions of the answer and schedules attached thereto. Upon consideration, it is

ORDERED that the motion be and hereby is granted and that the respondent be given until July 1, 1931, within which to file an amended answer.

(Signed) C. ROGERS ARUNDELL,
Member.

Dated, May 25, 1931.

Amended Answer to Amended Petition.

(Filed June 23, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for amended answer to the amended petition herein, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 1 of the amended petition.

2. Admits the allegations of paragraph 2 of the amended petition.

3. Admits the allegations of paragraph 3 of the amended petition.

4. Admits that the taxes in controversy are income taxes for the calendar year 1919, but denies that the amount in controversy is $12,007,315.11, and alleges that the amount in controversy is in excess of that sum.

5. (m) Admits that the Commissioner erred in determining that petitioner purchased the additional, or overriding, royalty of J. L. Kirkland, and J. B. Lantz, and one-half of the additional, or overriding, royalty of W. E. Wrather in the Duke-Knoles properties.

(n) Denies that the Commissioner erred in determining that petitioner acquired stock of the Tex-Penn Oil Company from J. L. Kirkland, J. B. Lantz and W. E. Wrather, but confesses that the Commissioner erred in determining the amount of the consideration given by petitioner therefor.

(s) Denies that the Commissioner, in his determination of petitioner's tax liability for the year 1919, failed to reduce petitioner's gain by petitioner's share of the tax determined to be due from the Tex-Penn Oil Company for the year 1919, but confesses that the Commissioner erred in so reducing petitioner's gain.

(t) Denies that the Commissioner, in his determination of petitioner's tax liability for the year 1919, failed to allow the petitioner the benefit of the limitation of surtax by the application in said computation of Section 211 (b) of the Revenue Act of 1918, but confesses that the Commissioner erred in allowing said limitation.

Denies that the Commissioner erred as set forth in paragraph 5 of the amended petition, except as error is hereinabove confessed.

6. (a) Admits the allegations of paragraph 6 (a).

(b) Admits the allegations of the first five sentences of paragraph 6 (b).

Admits that said five individuals assigned said leases to the Tex-Penn Oil Company. Alleges that said assignment was effected by a certain written instrument dated October 31, 1918, and executed by the Tex-Penn Oil Company and said five individuals, and that said instrument specified the rights of the parties to said instrument in the Duke-Knoles properties.

Denies the allegations of the sixth, seventh and ninth sentences of paragraph 6 (b), except as the rights of the

parties to said instrument of October 31, 1918, are established by said instrument.

Denies the allegations of the eighth sentence of paragraph 6 (b), and alleges that said five individuals purchased 4,000 shares of the stock of the Tex-Penn Oil Company for $100,000 in cash, and thereafter the Tex-Penn Oil Company purchased said leaseholds from said five individuals for $100,000 cash.

(c) Admits the allegations of the first three sentences of paragraph 6 (c).

Denies all the remaining allegations of paragraph 6 (c).

(d) Admits the allegations of paragraph 6 (d).

(e) Admits the allegations of the first sentence of paragraph 6 (e), and alleges that said authorization "to sell the entire leasehold interest" included the entire holdings of the Tex-Penn Oil Company and also the 5/8ths of total production reserved to said five individuals.

Admits that after said authorization, and before any sale of the entire 7/8th working interest in said Duke-Knoles properties was accomplished, J. L. Kirkland, W. E. Wrather and J. B. Lantz made a conditional sale of their stock in the Tex-Penn Oil Company to Messrs. Benedum and Parriott for a nominal consideration.

Denies that the condition upon said sale was as alleged in the second sentence of paragraph 6 (e).

Admits that at the time said conditional sale was made the five individuals and the Tex-Penn Oil Company executed written assignment, or assignments to the Transcontinental Oil Company of all of their respective holdings in the Duke-Knoles properties and deposited said document, or documents, with F. B. Parriott in escrow.

Admits the allegations of the third sentence of paragraph 6 (e).

Denies all the remaining allegations of paragraph 6 (e).

Alleges that the portion of the stock of the Tex-Penn Oil Company, so conditionally sold by Kirkland, Wrather and Lantz to Benedum and Parriott, and the assignment of the individually held interests of Kirkland, Wrather and Lantz in the Duke-Knoles properties were to be returned to Kirkland, Wrather and Lantz unless before August 1, 1919, said three individuals received in cash $5,250,000 less 7/16ths of $500,000, or such portion of said $500,000 as should be necessary to pay the net liabilities of the Tex-Penn Oil Company.

(f) Admits the allegations of paragraph 6 (f), but alleges that said acquisition of said stock from Kirkland, Wrather and Lantz by Benedum and Parriott was conditional as hereinabove alleged.

(g) Admits that petitioner's authority from his four associates, as evidenced by letter dated June 2, 1919, from them to him, expired on July 15, 1919, and denies all the remaining allegations of paragraph 6 (g).

(h) Admits the allegations of paragraph 6 (h).

(i) Admits that on or about August 1, 1919, transfers of assets to the Transcontinental Oil Company were made as alleged in the first sentence of paragraph 6 (i), but denies that said transfers were pursuant to a plan of consolidation and/or merger.

Admits that the bankers agreed to purchase and did receive 750,000 shares of Transcontinental Oil Company stock as alleged, and at the prices alleged, in the second sentence of paragraph 6 (i), but denies that said agreement, purchase and receipt was a part of a plan or reorganization, consolidation and/or merger.

(j) Admits that in exchange for the assets transferred by the Tex-Penn Oil Company that company received 1,007,834 shares of no par value stock of the Transconti-

nental Oil Company, but denies that said stock was the sole consideration received by the Tex-Penn Oil Company for the transfer of its assets.

Admits that the Riverside Eastern Oil Company received 41,666 shares of Transcontinental Oil Company stock and $1,250,000 in cash in exchange for the transfer of its assets.

Admits that the Riverside Western Oil Company received 41,667 shares of Transcontinental Oil Company stock and $1,250,000 in cash in exchange for the transfer of its assets.

Denies that the Pittsburgh-Texas Oil & Gas Company received 158,333 shares of the Transcontinental Oil Company stock in exchange for the transfer of its assets, and alleges that said Pittsburgh-Texas Oil & Gas Company received 158,833 shares of the Transcontinental Oil Company stock in exchange for the transfer of its assets.

Admits the allegations of the last two sentences of paragraph 6 (j).

Denies all the remaining allegations of paragraph 6 (j).

(k) Admits the allegations of paragraph 6 (k), except that respondent denies that the things therein alleged to have been done, and/or that the result of the action therein alleged to have been taken, were a part of a plan of merger and/or consolidation.

(l) Denies the allegations of paragraph 6 (l).

(m) Denies the allegations of paragraph 6 (m).

(n) Denies the allegations of the first four sentences of paragraph 6 (n).

Admits that at the time said 1,007,834 shares of Transcontinental Oil Company stock were delivered the Transcontinental Oil Company paid over to the Tex-Penn Oil Company $350,000 cash, and denies the remaining allegations of the fifth sentence of paragraph 6 (n).

Admits that said $350,000 was used by the Tex-Penn Oil Company to make payment upon its liabilities and denies the remaining allegations of the sixth sentence of paragraph 6 (n).

Denies the allegations of the seventh sentence of paragraph 6 (n), and denies that said seventh sentence is an allegation of fact.

(o) Admits the allegations of the first sentence of paragraph 6 (o), except that respondent denies that said agreement was a part of a plan of consolidation and/or merger.

Denies the allegations of the second sentence of paragraph 6 (o).

Admits that the syndicate was organized in July or August, 1919, and denies the remaining allegations of the third sentence of paragraph 6 (o).

Denies the allegations of the fourth and fifth sentences of paragraph 6 (o).

(p) Denies the allegations of paragraph 6 (p), and denies that the facts therein alleged are relevant or material to the decision of the issues in this appeal.

Denies each and every allegation of fact contained in said amended petition not hereinbefore specifically admitted, qualified or denied.

ASSERTION OF ADDITIONAL DEFICIENCY.

The respondent, as the basis for the assertion of a deficiency in addition to that determined in the deficiency notice, and confessing that the Commissioner erred as hereinabove admitted, alleges:

(1) That all of the allegations of the amended petition which are hereinabove admitted, and all of the allegations of this amended answer hereinabove made, are hereby referred to and made a part of this assertion of an additional deficiency.

(2) That in the computation of the deficiency, formal notice of which was mailed to the petitioner on July 8, 1927, the Commissioner determined that the petitioner purchased from J. L. Kirkland, W. E. Wrather and J. B. Lantz their individually owned interests, or overriding royalty, in the Duke-Knoles properties, and that upon the disposition thereof by petitioner to the Transcontinental Oil Company, petitioner sustained a loss; that said loss was allowed as a deduction from income in the computation, which resulted in the deficiency as shown by said deficiency notice of July 8, 1927.

(3) That in the computation of the deficiency, formal notice of which was mailed to petitioner on July 8, 1927, the Commissioner determined that the petitioner purchased stock of the Tex-Penn Oil Company from J. L. Kirkland, W. E. Wrather and J. B. Lantz for $1,285,729.28, and that the Commissioner allowed, upon disposition by petitioner of all of his stock in the Tex-Penn Oil Company, a deduction of said sum, as a part of the cost basis of said stock, from the consideration received by petitioner for all of his stock in the Tex-Penn Oil Company.

(4) That said cost to the petitioner of said stock so acquired from Kirkland, Wrather and Lantz was a nominal sum in the amount of $15.00.

(5) That in the computation of the deficiency, formal notice of which was mailed to petitioner on July 8, 1927, the Commissioner in computing petitioner's income for the year 1919 reduced the value of the 683,037.125 shares of Transcontinental stock received by petitioner by that proportion of the tax liability of the Tex-Penn Oil Company, as determined by the Commissioner, which 683,037.125 shares, determined by the Commissioner to have been received by the petitioner, bears to 1,007,834 shares.

(6) That the Tex-Penn Oil Company, in its appeal to this Board, Docket Number 11539, has denied tax liability for the year 1919 as determined by the Commissioner in the deficiency notice upon which the appeal of said Tex-Penn Oil Company is based, or in any amount; that the petitioner has not admitted that the Tex-Penn Oil Company is liable for Federal income and profits tax for the year 1919 as so determined by the Commissioner, or in any amount; that petitioner has not admitted that petitioner is liable as transferee of the assets of the Tex-Penn Oil Company for the tax of said company in the amount as determined by the Commissioner, or in any amount.

(7) That in the computation of the deficiency, formal notice of which was mailed to petitioner on July 8, 1927, the Commissioner allowed to the petitioner the benefit of the limitation of surtax by the application of Section 211 (b) of the Revenue Act of 1918.

The respondent hereby asserts an increase in the deficiency as determined in said deficiency notice on account of the understatement of petitioner's income for the year 1919, as hereinabove alleged, and on account of the allowance to petitioner of the limitation of surtax as hereinabove alleged.

WHEREFORE, the respondent prays that the deficiency herein be redetermined in the sum of $24,160,673.77.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
OTTAMAR HAMELE,
JOHN D. FOLEY,
BROOKS FULLERTON,
Special Attorneys,
Bureau of Internal Revenue.

6/22/31.

Reply to Amended Answer.

(Filed July 14, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENE[redacted]I,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 30990

Comes now the petitioner herein, by his attorneys, and in reply to the Assertion of Additional Deficiency set up on page 6 of the Commissioner's amended answer, admits, denies and alleges as follows:

1. Re-alleges as if fully incorporated herein all the allegations in the amended petition, and denies each and all of the allegations made in the amended answer, except as admitted herein.

2. Upon information and belief, denies the allegations made in paragraph (2) of the Assertion of Additional Deficiency, and in respect of such allegations begs leave to refer to the original notice of deficiency of July 8, 1927, which will be introduced at the trial, a copy of which is attached to the amended petition herein as Exhibit B.

3. Upon information and belief, denies the allegations made in paragraph (3) of the Assertion of Additional Deficiency, and in respect of such allegations begs leave to refer to the original notice of deficiency of July 8, 1927, which will be introduced at the trial, a copy of which is attached to the amended petition herein as Exhibit B.

4. Admits that the cost to the petitioner of the Tex-Penn Oil Company stock purchased from J. L. Kirkland, W. E. Wrather and J. B. Lantz was $15, as alleged in paragraph (4) of the Assertion of Additional Deficiency.

5. Upon information and belief, denies the allegations made in paragraph (5) of the Assertion of Additional Deficiency, and in respect of such allegations begs leave to refer to the original notice of deficiency of July 8, 1927, which will be introduced at the trial, a copy of which is attached to the amended petition herein as Exhibit B.

6. Admits that the Tex-Penn Oil Company, in its appeal to this Board, Docket No. 11589, has denied any and all tax liability for the year 1919 as determined by the Commissioner in the deficiency notice upon which the appeal of the said Tex-Penn Oil Company is based, or in any amount; and admits that the petitioner has not admitted, but on the contrary denies, that the Tex-Penn Oil Company is liable for any Federal income and profits taxes for the year 1919 as determined by the Commissioner, or in any amount; and admits that the petitioner has not admitted, but on the contrary denies, that the petitioner is liable as transferee of the assets of the Tex-Penn Oil Company for the tax of said Company in the amount as determined by the Commissioner, or in any amount; but the petitioner re-alleges that if the Tex-Penn Oil Company should be held liable for any Federal income and profits taxes for the year 1919, the amount thereof should be deducted in computing any and all profit, if any, which the petitioner may have realized in 1919 upon the receipt of the Transcontinental stock distributed by the Tex-Penn Oil Company in exchange for the petitioner's Tex-Penn stock.

7. Upon information and belief, denies the allegations made in paragraph (7) of the Assertion of Additional Deficiency, and in respect of such allegations begs leave to refer to the original notice of deficiency of July 8, 1927,

which will be introduced at the trial, a copy of which is attached to the amended petition herein as Exhibit B.

8. Denies that the aforesaid notice of deficiency understated the petitioner's income for the year 1919, but on the contrary alleges that there is no deficiency whatsoever in respect of petitioner's income and profits taxes for 1919.

WHEREFORE petitioner prays that the Board disallow the additional deficiency asserted and that it further make a finding of no deficiency in the petitioner's income and profits taxes for 1919, and for such other and further relief as to the Board may seem proper.

JOHN W. DAVIS,
M. B. ANGELL,
HORACE MANN,
J. C. ADAMS,
Attorneys for the Petitioner,
15 Broad Street,
New York City.

STATE OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY, } ss.:

M. L. BENEDUM, being duly sworn, says that he is the petitioner above named; that he has read the foregoing Reply to the Commissioner's Amended Answer, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

M. L. BENEDUM.

Subscribed and sworn to before me
this 9th day of July, 1931.

ANNA M. NUERNBERG,
Notary.

Amended Motion to Confine the Hearing in the First Instance.

(Filed December 10, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

Now comes the petitioner, by his attorneys, and moves this Honorable Board that the hearing in the above-entitled appeal be limited in the first instance to a hearing at which the following issues and only the following issues shall be heard and considered:

1. To a consideration of the issues raised in assignments of error numbered 5 (a) through 5 (e), inclusive, of the amended petition, which, briefly stated, raise the question whether the transaction whereby the petitioner in 1919 exchanged his stock of the Tex-Penn Oil Co. for stock of the Transcontinental Oil Co., such Transcontinental stock so received having no greater aggregate par or face value than the Tex-Penn Oil Co. stock exchanged therefor, constituted a taxable or non-taxable transaction within the 1918 Revenue Act and Article 1567 of Regulations 45, as amended.

2. To a consideration of the issues raised in assignments of error numbered 5 (f) and 5 (g), which, briefly stated, raise the question whether the receipt in 1919 of such Transcontinental stock, subject as it was at all times dur-

ing 1919 to a binding agreement under which such stock could not be disposed of or realized upon until after the close of the taxable year 1919, resulted as a matter of law in the realization of any income, taxable in 1919.

3. To a consideration of the issues raised in assignments of error numbered 5 (k) and 5 (l).

4. To a consideration of the issues raised in assignments of error numbered 5 (m) and 5 (n).

5. To a consideration of the issue raised in assignment of error numbered 5 (t), involving Section 211 (b) of the 1918 Act, including a consideration of the issue raised by the Government in the affirmative allegation in its amended answer to the amended petition in respect of the propriety of any or all allowance under the aforesaid section.

6. To a consideration of the issue raised in assignment of error numbered 5 (u).

7. To a consideration of the issue raised in assignment of error numbered 5 (v).

In support of this motion, petitioner alleges as follows:

If either or both of the issues referred to in paragraphs 1 and 2, supra, are decided favorably to the petitioner and if all of the remaining issues set forth above are decided favorably to the petitioner, a decision of no deficiency follows a matter of course. On the other hand, in the event of an adverse decision on these points, fundamental questions of valuation will arise, which may be presented and considered later at a subsequent hearing had for the purpose of taking additional testimony.

Amended Motion to Confine Hearing.

WHEREFORE, petitioner prays that the motion herein may be granted and that an order be entered limiting the issues to be considered at the first hearing in this case in accordance with this motion, and that if the Board shall reach the conclusion that it cannot, upon the testimony so adduced, dispose of the cause upon the first hearing, it shall set a date for a further and final hearing in the cause, at which additional evidence may be introduced.

Respectfully submitted,

M. B. ANGELL,
Counsel for Petitioner.

Order.

(Filed December 10, 1931.)

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

These proceedings having duly come on for hearing on December 9, 1931, on motion of counsel for the petitioners to limit the hearing in the first instance, and amended motions to confine the hearing in the first instance having been filed under date of December 10, 1931, and no objection having been interposed by respondent to said motions as amended, it is hereby

ORDERED that the said amended motions to confine the hearing in the first instance be and hereby are granted.

(Signed) J. E. MURDOCK,
Member.

Dated December 10, 1931.
j.

Order.

UNITED STATES BOARD OF TAX APPEALS

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30090

This proceeding came on for hearing on March 8, 1932, pursuant to order of the Board dated December 10, 1931, granting tentative severance of the issues in order that hearing might be had on certain issues of law prior to a hearing on other issues raised by the pleadings. Testimony was taken and argument heard on such issues of law.

On full consideration of which, it is

ORDERED that the proceeding be and it is hereby restored to the day calendar of May 16, 1932, for further hearing on all questions in dispute under the issues as raised by the pleadings.

(Signed) C. ROGERS ARUNDELL,
Member.

April 4, 1932.

Recomputation of the Deficiency *re* M. L. Benedum, Filed by General Counsel on February 2, 1933.

STATEMENT

In re: M. L. Benedum,
Pittsburgh, Pennsylvania.

Income Tax Liability

Year	*Income Tax Liability*	*Income Tax Assessed*	*Deficiency*
1919	$3,343,299.30	$472,961.57	$2,870,337.73

Year ended December 31, 1919

Schedule 1

Net Income

Net income as disclosed by return		$1,507,921.24
As corrected		4,678,916.59
Net adjustment		$3,170,995.35
Unallowable deductions and additional income:		
(a) Profits on sales	$6,679,552.39	
(b) Interest on tax free bonds	250.00	
(c) Interest on tax free bonds paid by debtor corporation	5.00	
(d) Taxable interest U. S. obligations	850.00	
(e) Bad debts and other deductions overstated	97,872.89	
Total		$6,778,530.28
Nontaxable income and additional deductions:		
(f) Interest on bonds and mortgages overstated	$ 253.33	
(g) Rents and royalties overstated	90,481.75	
(h) Proportionate share of Tex-Penn Oil Company tax	3,516,799.85	
Total		3,607,534.93
Net adjustment as above		$3,170,995.35

Explanation of Items Changed

(a)	Profits on sales increased		$6,679,552.39
	Selling price of 6/16 of 5/8 of production from Duke-Knoles pool and your share of Tex-Penn Oil Co. stock.		
	Received:		
10	Cash		$1,368,750.00
	Transcontinental Oil Co. stock 683037.125 shares at $10.00		6,830,371.25
	Total received		$8,199,121.25
	Cost, Tex-Penn stock:		
	Cash paid for stock—6/16 of $328,000..	$123,000.00	
	Paid Wrather, Lantz & Kirkland	15.00	
	South American & West Texas oil lands —¾ of $100,000.00	75,000.00	
	Total cost Tex-Penn stock		198,015.00
	Profit realized		$8,001,106.25
	Profit on retirement of preferred stock of Riverside Western Oil Co.—5589 shares		
20	at $25.00	$139,725.00	
	Cost 5589 shares at $15.00	83,835.00	
	Profit		55,890.00
	Profit on retirement of preferred stock of Riverside Eastern Oil Co.—11,900 shares		
	at $5.00	$59,500.00	
	Cost 11,900 shares at $3.50	41,650.00	
	Profit		17,850.00
	Profit—Penn-Mex as reported		400.00
	Profit—Und. account Tropical Oil Co. as reported		2,133.40
	Profit—Tropical Oil Co. as reported		44.80
	Profit—Riverside Western debentures as reported		360.00
30	Profit—Riverside Eastern debentures as reported		785.00
	Total		$8,078,569.45
	Less: Loss on Manufacturers Light & Heat Co. bonds.		780.83
	Total profits on sales as corrected		$8,077,788.62
	Profits as reported on return		1,398,236.23
	Adjustment, addition to income		$6,679,552.39
(b)	Interest on tax free bonds received		$ 19,375.00
	Interest on tax free bonds reported		19,125.00
	Adjustment, addition to income		$ 250.00

40

Recomputation of Deficiency.

(c)	Interest on tax free bonds paid by debtor corporation—		
	As corrected		$ 387.50
	As reported		382.50
	Adjustment, addition to income		$ 5.00
(d)	Taxable interest on bonds and obligations of the United States received		$ 1,684.28
	As reported		834.28
	Adjustment, addition to income		$ 850.00
(e)	Bad debts and other deductions overstated		$ 97,872.89
	This amount is composed of the following:		
	Benedum Coal Company		549.80
	Water Power Company plant		5,282.34
	Steel City Oil & Gas Company		5,027.20
	General expense, gifts		150.00
	Expenses Tex-Penn Oil Company		86,863.35
			$ 97,872.89

Item "Expenses Tex-Penn Oil Co." is disallowed as a deduction under this heading, but is allowed as an offset against royalties received thereby reducing income.

(f)	Interest received overstated		$ 253.33
	Interest reported on return		$ 49,022.78
	Interest received:		
	On bonds and mortgages	$27,656.29	
	On bank deposit	21,113.16	
	Total received		48,769.45
	Adjustment, reduction of income		$ 253.33
(g)	Rents and royalties reported		$ 179,887.27
	As corrected		89,405.52
	Adjustment, reduction of income		$ 90,481.75

This item is composed of the following:

Assessment to pay obligations of Tex-Penn Oil Co. in accordance with contract:		
6/16 of $231,636.05		$ 86,863.52
6/16 of $ 9,648.61		3,618.23
Total		$ 90,481.75

The item $86,863.52 was deducted on return under Bad Debts. It has been eliminated from that heading and allowed as an offset against royalties received.

Recomputation of Deficiency.

(h) Proportion of tax liability proposed against Tex-Penn Oil Co. for the year 1919 to be assumed by the two sole stockholders on the basis of Transcontinental Oil Company stock received by each:

Tax liability	$5,189,103.68
Shares of Transcontinental Oil Co. issued	1,007,834
Liability per share	$5.148768229
Shares of Transcontinental Oil Co. stock received by M. L. Benedum	683,037.125
M. L. Benedum's proportionate share of Tex-Penn Oil Company tax	$3,516,799.85

SCHEDULE 2

Computation of Tax

Total net income as corrected		$4,678,916.59
Less:		
Exemption	$ 2,000.00	
Dividends	67,063.36	
Taxable interest on United States obligations	1,684.28	
Total		70,747.64
Net income subject to normal tax		$4,608,168.95
Subject to tax at 4%		$ 4,000.00
Subject to tax at 8%		4,604,168.95

TAX

Normal tax at 4%		$ 160.00
Normal tax at 8%		368,333.52
Surtax on $4,678,916.59		2,974,805.78
Total tax assessable		$3,343,299.30
Tax paid at source	$ 387.50	
Tax previously assessed	472,574.07	472,961.57
Deficiency in tax		$2,870,337.73

Findings of Fact and Opinion of the Board, Promulgated August 8, 1933.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	B.T.A. No. 30990

The findings and opinion of the Board herein will be found printed in full in the printed Transcript of Record in the companion case of Tex-Penn Oil Company v. Commissioner (B. T. A. Docket No. 11539) at pages 60 to 154, *supra*. Pursuant to stipulation approved by the Court the same has not been reprinted at length herein.

Motion for Additional Findings of Fact, Filed by General Counsel September 16, 1933.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

Comes now the Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and moves that the Board's findings of fact promulgated August 8, 1933, in the above-entitled cases be amended by the addition of one finding, as follows:

(116) In one indivisible transaction Parriott exchanged Tex-Penn stock and individually owned overriding royalty in the Duke-Knoles leases for Transcontinental stock and cash. The same is true of Benedum.

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
OTTAMAR HAMELE,
JOHN D. FOLEY,
BROOKS FULLERTON,
Special Attorneys,
Bureau of Internal Revenue.

Motion for Leave to Withdraw Motion for Additional Findings of Fact, Filed by General Counsel October 14, 1932, with the Order Granting Same.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

Now comes the Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and requests leave to withdraw from the Board's consideration the "Motion for an Additional Finding of Fact" filed September 16, 1933, and requests further that upon the granting of this permission said motion be treated as withdrawn.

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
OTTAMAR HAMELE,
JOHN D. FOLEY,
BROOKS FULLERTON,
Special Attorneys,
Bureau of Internal Revenue.

Granted
Oct. 16, 1933
(Signed) C. Rogers Arundell
Member
U. S. Board of Tax Appeals

Petitioner's Exceptions to Certain of the Board's Findings of Fact.

(Filed February 9, 1935.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

WHEREAS, at the conclusion of the hearing of the above-named cause before Division No. 7 of the Board of Tax Appeals, counsel for the petitioner and respondent each submitted proposed findings of fact, and

WHEREAS, in its report promulgated August 8, 1933, the Board made certain findings of fact contrary to those requested by the petitioner,

NOW, THEREFORE, the petitioner respectfully notes an exception to each of the findings of fact referred to below and prays allowance thereof by the Board, reserving, however, the right upon the filing of a petition for review of the Board's decision herein to assign as error any and all findings or conclusions embodied in the opinion of the Board published as part of the report promulgated August 8, 1933.

(1) The petitioner notes an exception to the Board's finding No. 27 in that it indicates the only material provisions of the Syndicate Agreement were, as found by the Board, that the bankers

> "had contracted to purchase 500,000 shares (of Transcontinental stock) at $40 per share, that they

were to be sole managers of the Syndicate, which was to continue until October 18, 1919, unless sooner terminated, but with an option to extend it for 90 days."

(2) The petitioner notes an exception to the second sentence of the Board's finding No. 33, which finding in entirety is as follows:

"Wrather, Lantz and Kirkland had frequent consultations regarding the sale of their Tex-Penn stock and individual interests in the Duke-Knoles leases. They were willing to have the transaction take the form set out in the second letter of July 12, 1919, inasmuch as under that form they were to receive the $5,250,000 theretofore agreed upon as adequate consideration for both their stock and lease interests, but with the condition attached that in the event the transaction was not consummated so as to net them the cash demanded the stock was to be retransferred."

(3) The petitioner notes an exception to the Board's finding No. 66.

(4) The petitioner notes an exception to the finding of the Board No. 76.

(5) The petitioner notes an exception to the following portion of the Board's finding No. 77:

"The fair market value of Riverside Eastern assets acquired by Transcontinental was $160,000."

(6) The petitioner notes an exception to the following portion of the Board's finding No. 78:

"The fair market value of Riverside Western assets acquired by Transcontinental was $233,608."

Petitioner's Exceptions to Certain Findings.

(7) The petitioner notes an exception to the finding of the Board No. 89.

(8) The petitioner notes an exception to the finding of the Board No. 97.

(9) The petitioner notes an exception to the finding of the Board No. 106 that the deficit of Transcontinental from August 1, 1919, to December 31, 1924, was only $6,254,400.89.

(10) The petitioner notes an exception to the Board's finding No. 112.

(11) The petitioner notes an exception to the Board's finding No. 113.

(12) The petitioner notes an exception to the Board's finding No. 114.

(13) The petitioner notes an exception to the Board's finding No. 115.

Dated, February 5, 1935.

JOHN W. DAVIS,
Counsel for Petitioner.

May 9, 1935.

Exceptions allowed.

(s) C. ROGERS ARUNDELL.

Motion for Additional Findings of Fact, Filed by Petitioner.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

Comes now the above-named petitioner by counsel and respectfully shows to the Board:

At the conclusion of the hearing of the above-named cause before Division #7 of the Board of Tax Appeals on November 23, 1932, it was agreed between the members of such division and counsel for the petitioner and for the respondent that the respective parties, through counsel, would submit proposed findings of fact; and

The petitioner on February 1, 1933, filed with the Board a document entitled "Petitioners' Proposed Findings of Fact" and requested that the Board adopt said several proposed findings of fact and conclusions as the several findings of fact and conclusions of the Board upon all the evidence in this cause. A copy of such proposed findings and conclusions is hereto annexed and made part hereof as fully for all purposes as though extended herein; and

In its findings and opinion promulgated August 8, 1933, the Board failed or refused to make certain of such findings of fact and conclusions so requested by the petitioner as more particularly hereinafter referred to and enumerated by reference to the number and paragraph of said several proposed findings of fact and conclusions.

NOW, THEREFORE, petitioner respectfully moves that the Board in addition to the findings of fact made in the decision of the Board promulgated August 8, 1933, in this cause, make and adopt the several findings of fact and conclusions set forth at length in the annexed document entitled "Petitioner's Proposed Findings of Fact" in so far as the same are contained under the following numbered paragraphs, to wit: 13, 14, 34, 35, 37, 38, 40, 41, 42, 43, 47, 54, 56, 57, 58, 60, 64, 65, 66, 67, 71, 73, 74, 78, 80, 81, 82, 83, 84, 85, 86, 89, 91, 93, 94, 95, 96, 98, 99, 104, 106, 107, 109, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 125, 126, 127, 129, 131, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 167, 168, 169, 170, 171, 172, 173, 174, 175, 177, 178, 180, 181, 182, 183, 186, 187, 190, 191, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207 and 209.

Each of the above-numbered paragraphs as the same appear in the annexed copy of the proposed findings have been identified by the marginal notation "Exception noted."

Petitioner further respectfully requests that the Board allow the petitioner an exception to the refusal of each of such requests for findings and conclusions as may be denied.

Dated, February 5, 1935.

JOHN W. DAVIS,
Counsel for Petitioner.

Petitioner's Proposed Findings of Fact.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	B.T.A. No. 30990

Petitioner's request for findings of fact will be found printed in full in the printed Transcript of Record in the companion case of Tex-Penn Oil Company v. Commissioner (B. T. A. Docket No. 11539) at pages 162 to 280, *supra*. Pursuant to stipulation approved by the Court the same has not been reprinted at length herein.

Order on Petitioner's Motion for Additional Findings of Fact.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

This proceeding came on for hearing before Division #7 on the attached motion of the petitioner for findings of fact in addition to those made by the Board in its decision promulgated August 8, 1933. Upon consideration, it is

ORDERED that the motion be and hereby is denied and that petitioner be allowed an exception to the refusal by the Board in each instance to make and adopt the several findings of fact and conclusions set forth at length in the document entitled "Petitioner's Proposed Findings of Fact" heretofore filed in this cause on February 1, 1933, in so far as the same are contained in the following numbered paragraphs, to wit: 13, 14, 34, 35, 37, 38, 40, 41, 42, 43, 47, 54, 56, 57, 58, 60, 64, 65, 66, 67, 71, 73, 74, 78, 80, 81, 82, 83, 84, 85, 86, 89, 91, 93, 94, 95, 96, 98, 99, 104, 106, 107, 109, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 125, 126, 127, 129, 131, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 167, 168, 169, 170, 171, 172, 173, 174, 175, 177, 178, 180, 181, 182, 183, 186, 187, 190, 191, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207 and 209.

Dated, May 9, 1935.

C. ROGERS ARUNDELL.

Respondent's Notice of Settlement.

UNITED STATES BOARD OF TAX APPEALS.

(Filed June 27, 1935.)

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	B.T.A. No. 30990

The attached proposed determination of tax liability under the opinion of the United States Board of Tax Appeals, decided August 8, 1933, will be presented to the Board for settlement on the day of 1935.

This notice of proposed determination is submitted in accordance with the decision of the Board without prejudice to the Commissioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
BROOKS FULLERTON,
Special Attorney,
Bureau of Internal Revenue.

jpm 5-10-35

Notice of Hearing Under Rule 50.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

July 6, 1935.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

TAKE NOTICE that the respondent in the above-entitled proceeding filed with the Board on June 27, 1935, a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 9.30 a. m. on July 18, 1935, before a Division of the Board at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquiescence to the entry of a decision based on such computation shall have been filed with the Board.

No further notice of said hearing will be sent.

B. D. GAMBLE,
Clerk.

To:

H. A. MANN, Esq.,
413 Munsey Bldg.,
Washington, D. C.

C. C. JOHN O. WICKS, Esq.,
Park Bldg.,
Pittsburgh, Pa.

Respondent's Proposed Computation of Deficiency.

(Filed June 27, 1935.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

IT:AR:B-5
FMS

STATEMENT

In re M. L. BENEDUM,
Pittsburgh, Pa.

INCOME TAX LIABILITY

Year	*Income Tax Liability*	*Income Tax Assessed*	*Deficiency*
1919	$2,398,428.52	$472,961.57	$1,925,466.95

Year ended December 31, 1919

SCHEDULE 1

Net Income

Net income as disclosed by return		$1,507,921.24
As corrected		4,198,629.97
Net adjustment		$2,690,708.73
Unallowable deductions and additional income:		
(a) Profits on sales	$4,628,280.38	
(b) Interest on tax free bonds	250.00	
(c) Interest on tax free bonds paid by debtor corporation	5.00	
(d) Taxable interest U. S. obligations	850.00	
(e) Bad debts and other deductions overstated	97,872.89	
Total		4,727,258.27

Respondent's Proposed Computation.

Nontaxable income and additional deductions:			
(f) Interest on bonds and mortgages overstated		$ 253.33	
(g) Rents and royalties overstated		90,481.75	
(h) Proportionate share of Tex-Penn Oil Co. tax		1,945,814.46	
Total			2,036,549.54
Net adjustment as above			$2,690,708.73

Explanation of Items Changed

(a) Profits on sales increased			$4,628,280.38
Selling price of 6/16 of ⅝ of production from Duke-Knoles pool and your share of Tex-Penn Oil Co. stock.			
Received:			
Cash			$1,368,750.00
Transcontinental Oil Co. stock—683037.125 shares at $7.00			4,781,259.88
Total received			$6,150,009.88
Cost, Tex-Penn stock:			
Cash paid for stock—6/16 of $328,000		$123,000.00	
Paid Wrather, Lantz & Kirkland		15.00	
South American & West Texas oil lands —¾ of $100,000.00		75,000.00	
Total cost Tex-Penn stock			198,015.00
Profit realized			$5,951,994.88
Profit on retirement of preferred stock of Riverside Western Oil Co.—5589 shares at $25.00		$139,725.00	
Cost 4849 shares at $15.00	$72,735.00		
Cost 740 shares at $15.00	13,260.64	85,995.64	
Profit			53,729.36
Profit on retirement of preferred stock of Riverside Eastern Oil Company—11,900 shares at $5		$59,500.00	
Cost 11,900 shares at $3.50		41,650.00	
Profit			17,850.00
Profit—Penn-Mex as reported			400.00
Profit—Und. account Tropical Oil Co. as reported			2,133.40
Profit—Tropical Oil Co. as reported			44.80
Profit—Riverside Western debentures as reported			360.00
Profit—Riverside Eastern debentures as reported			785.00

Respondent's Proposed Computation.

Total		$6,027,297.44
Less: Loss on Manufacturers Light & Heat Co. bonds		780.83
Total profits on sales as corrected		$6,026,516.61
Profits as reported on return		1,398,236.23
Adjustment—addition to income		$4,628,280.38
(b) Interest on tax free bonds received		$ 19,375.00
Interest on tax free bonds reported		19,125.00
Adjustment—addition to income		$ 250.00
(c) Interest on tax free bonds paid by debtor corporation—		
As corrected		$ 387.50
As reported		382.50
Adjustment—addition to income		$ 5.00
(d) Taxable interest on bonds and obligations of the U. S. received		$ 1,684.28
As reported		834.28
Adjustment—addition to income		$ 850.00
(e) Bad debts and other deductions overstated. This amount is composed of the following:		
Benedum Coal Co.		$ 549.80
Water Power Co. plant		5,282.34
Steel City Oil & Gas Co.		5,027.20
General expense, gifts		150.00
Expenses Tex-Penn Oil Co.		86,863.55
		$ 97,872.89

Item "Expenses Tex-Penn Oil Co." is disallowed as a deduction under this heading, but is allowed as an offset against royalties received, thereby reducing income.

(f) Interest received overstated		$ 253.33
Interest reported on return		$ 49,022.78
Interest received:		
On bonds and mortgages	$27,656.29	
On bank deposit	21,113.16	
Total received		48,769.45
Adjustment—reduction of income		$ 253.33

Respondent's Proposed Computation.

(g)	Rents and royalties reported	$ 179,887.27
	As corrected	89,405.52
	Adjustment—reduction of income	$ 90,481.75

This item is composed of the following:

Assessment to pay obligations of Tex-Penn Oil Co. in accordance with contract:

6/16 of $231,636.05	$ 86,863.52
6/16 of $ 9,648.61	3,818.23
Total	$ 90,481.75

This item $86,863.52 was deducted on return under "Bad Debts." It has been eliminated from that heading and allowed as an offset against royalties received.

(h) Proportion of tax liability proposed against Tex-Penn Oil Co. for the year 1919 to be assumed by the two sole stockholders on the basis of Transcontinental Oil Co. stock received by each:

Tax liability of Tex-Penn Oil Co.	$2,874,085.48
Shares of Transcontinental Oil Co. issued	1,007,834
Liability per share	2.848768199
Shares of Transcontinental Oil Co. stock received by M. L. Benedum	683,037.125
M. L. Benedum's proportionate share of Tex-Penn Oil Co. tax	$1,945,814.46

SCHEDULE 2

Computation of Tax

Total net income as corrected		$4,198,629.97
Less:		
Exemption	$ 2,000.00	
Dividends	67,063.36	
Taxable interest on U. S. obligations	1,684.28	
Total		70,747.64
Net income subject to normal tax		$4,127,882.33
Subject to tax at 4%		$ 4,000.00
Subject to tax at 8%		4,123,882.33

TAX

Normal tax at 4%	$ 160.00
Normal tax at 8%	329,910.59
Surtax on $4,198,629.97	2,662,619.48
Total tax	$2,992,690.07

Respondent's Proposed Computation.

LIMITATION OF SURTAX

Proportion of income from sale of discovery oil property against total net income:		
$1,368,750.00 sales price ÷ $4,198,629.97 income		= 32.59991%
32.59991 × $2,662,619.48 surtax		= $868,011.55
20% of $1,368,750.00		= 273,750.00
Excess surtax to be deducted		$594,261.55
Total tax shown above		$2,992,690.07
Less excess surtax		594,261.55
Total tax assessable		$2,398,428.52
Less:		
Tax paid at source	$ 387.50	
Tax previously assessed	472,574.07	472,961.57
Deficiency in tax		$1,925,466.95

Petitioner's Objections to Respondent's Proposed Computation of Deficiency.

UNITED STATES BOARD OF TAX APPEALS.

(Filed July 13, 1935.)

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

Now comes the petitioner, by his counsel, and objects to the proposed computation of the deficiency in the above-entitled appeal filed by the respondent on 1935, in the following particulars:

(1) In arriving at the basis of the petitioner's Tex-Penn stock surrendered upon the liquidation of the Tex-Penn Oil Company, the respondent has failed to include the cost to the petitioner of the 1500 shares of Tex-Penn stock constituting the petitioner's share of the 4000 shares of Tex-Penn stock issued on October 31, 1918, in exchange for the 2/8th interest in the Duke-Knoles properties, which basis is the fair market value of such 1500 shares of stock when acquired.

(2) In arriving at the basis of the petitioner's Tex-Penn stock surrendered upon the liquidation of the Tex-Penn Oil Company, the respondent has failed to include the cost to the petitioner of his share of the 66,880 shares of Tex-Penn stock issued on July 24, 1919, in exchange for the Sutton-Oldham and South American properties, which basis is the fair market value of the petitioner's share of such 66,880 shares when acquired.

(3) In arriving at "profits on sales," the respondent has failed to segregate the consideration received upon the surrender of the petitioner's Tex-Penn stock in liquidation from the aggregate consideration received for the petitioner's Tex-Penn stock and for the petitioner's share of the individually owned 5/8ths interest in the Duke-Knoles leases.

(4) The respondent has erroneously computed the petitioner's adjusted net income at $4,198,629.97, whereas such net income did not exceed $1,561,199.55.

(5) The respondent has erroneously computed the deficiency in petitioner's income and surtaxes at $1,925,466.95, whereas such deficiency did not exceed $36,760.63.

There is attached hereto petitioner's proposed computation of the deficiency.

MONTGOMERY B. ANGELL,
Counsel for the Petitioner.

Petitioner's Counter Computation of Deficiency Under Rule 50.

STATEMENT

M. L. BENEDUM
Benedum-Trees Building
Pittsburgh, Pennsylvania

INCOME TAX LIABILITY

Year	*Income Tax Liability*	*Income Tax Assessed*	*Deficiency*
1919	$509,722.20	$472,961.57	$36,760.63

Year ended December 31, 1919

SCHEDULE 1

Net Income

Net income as disclosed by return (includes $1,368,750.00 as M. L. Benedum's individual share of Duke-Knoles pool)			$1,507,921.24
As corrected			1,561,199.55
Net adjustment			$ 53,278.31
Unallowable deductions and additional income:			
(a) Profits on sales		$45,035.50	
(b) Interest on tax free bonds		250.00	
(c) Interest on tax free bonds paid by debtor corporation		5.00	
(d) Taxable interest on U. S. obligations		850.00	
(e) Bad debts and other deductions overstated		97,872.89	
Total			$ 144,013.39
Non-taxable income and additional deductions:			
(f) Interest on bonds and mortgages overstated		$ 253.33	
(g) Rents and royalties overstated		90,481.75	
Total			90,735.08
Net adjustment as above			$ 53,278.31

Explanation of Foregoing Items

(a) Profits on sales increased:			
(1) Cash received from sale of individually owned interest in Duke-Knoles pool			$1,368,750.00
(2) Sale on liquidation of Tex-Penn Oil Co. 683,037.-125/1,007,834 of net distributable assets:			
(a) Cash from Transcontinental Oil Co. (Not proven and not found)	$.....		
(b) Other assets on dissolution (See computation (2) (b) following)	4,809,890.19		
Total received (Not proven and not found)	$.....		
Cost of Tex-Penn stock:			
(1) 1,500 shares received in exchange for leases on 10/31/18 (Not proven and not found)	$.....		
(2) 3,420 shares subsequently acquired for cash	85,500.00		
(3) Interest in 66,880 shares issued jointly to M. L. Benedum and F. B. Parriott on 7/24/19 for Sutton and Oldham County leases and South American properties (Not proven and not found)	.....		
(4) Paid Wrather Lantz and Kirkland	15.00		
Total costs (Not ascertainable)	$.....		
Net profit realized on sale of Tex-Penn Oil Company stock (Not ascertainable)			.....
(3) Profits on retirement of preferred stock of Riverside Western Oil Company, 5,589 shares @ $25.00	$139,725.00		
Cost of 4,849 shares @ $15.00	$72,735.00		
Cost of 740 shares	13,260.64	85,995.64	53,729.36
(4) Profit on retirement of preferred stock of Riverside Eastern Oil Company, 11,900 shares @ $5.00	$ 59,500.00		
Cost of 11,900 shares @ $3.50	41,650.00		17,850.00
(5) Profit—Penn-Mex as reported			400.00
(6) Profit—Und. account Tropical Oil Company as reported			2,133.40
(7) Profit—Tropical Oil Company as reported			44.80
(8) Profit—Riverside Western debentures as reported			360.00
(9) Profit—Riverside Eastern debentures as reported			785.00
Total			$1,444,052.56

(10)	Less: Loss on Manufacturers Light & Heat Company bonds		780.82
	Total profits on sales		$1,443,271.73
	Profits as reported on return		1,398,236.23
	Adjustment, addition to income		$ 45,035.50

Computation of item (2) (b) on page 1.

Tex-Penn Oil Company—Liquidation Account

Available assets:		
Cash on hand	$ 11,225.20	
Cash from Transcontinental Oil Co.	350,000.00	
5/16 of oil money—Indebtedness Fund.	286,891.29	
Notes and accounts receivable	58,581.62	
Due from Transcontinental Oil Co. current account	81,188.37	
Inventory—Oil	92,981.44	
Transcontinental Oil Co. stock—1,007,834 shares	7,054,838.00	
Total available assets		$7,935,705.92
Liabilities to be liquidated:		
Notes and accounts payable	$ 530,094.41	
Advances—F. B. Parriott, attorney	288,000.00	
Reserve for Federal taxes	20,528.95	
Total liabilities		838,623.36
Net available assets		$7,097,082.56
M. L. Benedum's share in liquidation: 683,037.125 / 1,007,834 of $7,097,082.56 =	$4,809,890.19	
(b) Interest on tax free bonds received	$ 19,375.00	
Interest on tax free bonds reported	19,125.00	
Adjustment, addition to income		$ 250.00
(c) Interest on tax free bonds paid by debtor corporation as corrected	$ 387.50	
Amount reported	382.50	
Adjustment, addition to income		$ 5.00
(d) Taxable interest on bonds of U. S. as corrected	$ 1,684.28	
As reported	834.28	
Adjustment, addition to income		$ 850.00

Petitioner's Counter Computation.

(e) Bad debts and other deductions overstated composed of the following:			
Benedum Coal Company	$ 549.80		
Water Power Company plant	5,282.34		
Steel City Oil & Gas Company	5,027.20		
General expense, gifts	150.00		
Expenses, Tex-Penn Oil Company	86,863.55		
Adjustment, addition to income		$ 97,872.89	
(f) Interest received on bonds and mortgages as reported on return	$ 49,022.78		
As corrected	48,769.45		
Adjustment, reduction of income		$ 253.33	
(g) Rents and royalties as reported on return	$ 179,887.27		
As corrected	89,405.52		
Adjustment, reduction of income		$ 90,481.75	

This represents payments made to discharge obligations of the Tex-Penn Oil Company in accordance with contract and serves to reduce amount received from royalties from sale of oil:

6/16 of $231,636.05	$86,863.52
6/16 of 9,648.61	3,818.23
	$90,481.75

Schedule II

Computation of Tax

Net income as corrected		$1,561,199.55
Less:		
Exemption	$ 2,000.00	
Dividends	67,063.36	
Taxable interest on U. S. obligations	1,684.28	70747.64
Net income subject to normal tax		$1,490,451.91
Subject to tax at 4%		$ 4,000.00
Subject to tax at 8%		1,486,451.91
Normal tax at 4%		$ 160.00
Normal tax at 8%		118,916.15
Surtax		948,289.71
		$1,067,365.86

Petitioner's Counter Computation.

Limitation of Surtax

Proceeds from sale of individually owned interest in Duke-Knoles pool		$1,368,750.00
Proportion of net income from sale of individually owned interest to total net income:		
$1,368,750.00 ÷ $1,561,199.55		= 87.67296%
87.67296% of $ 948,289.71		= $831,393.66
20% of $1,368,750.00		= 273,750.00
Excess surtax to be deducted		$ 557,643.66
Total tax as shown above		$1,067,365.86
Less: Excess surtax		557,643.66
Total tax assessable		$ 509,722.20
Less:		
Tax paid at source	$ 387.50	
Tax previously assessed	472,574.07	472,961.57
Deficiency		$ 36,760.63

Respondent's Request and Motion for Additional Findings.

(Filed July 17, 1935.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	B.T.A. No. 30990

Comes now the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and requests and moves that additional findings of fact to those heretofore promulgated in the above-entitled cases be made as follows:

The shares of stock of the Tex-Penn Oil Company had no fair market value on October 31, 1918, when the Tex-Penn Oil Company acquired the Duke-Knoles leases, and had no fair market value immediately subsequent to that date.

The shares of stock of the Tex-Penn Oil Company had no fair market value on July 23 and 24, 1919, when Tex-Penn Oil Company exchanged 66,880 shares of its own capital stock for certain oil leases in Sutton and Oldham Counties, Texas, and certain leases and options in South America, and had no fair market value immediately subsequent to said date.

Said exchange of 66,880 shares of stock of the Tex-Penn Oil Company for said leases and options was not a closed transaction, and the basis to Tex-Penn Oil Company of the assets received on such exchange is the cost to Bene-

dum and Parriott, which for the South American leases and options was $100,000, and for the Sutton and Oldham County leases was nothing.

The basis to Tex-Penn Oil Company of the assets transferred to Transcontinental Oil Company on or about August 1, 1919, is as follows:

Well farm investment	$ 633,828.32
Inventory—Warehouse supplies	158,418.25
Duke-Knoles leases	100,000.00
Miscellaneous leases	63,223.29
Sutton and Oldham County leases	0.00
South American leases and options	100,000.00
	$1,055,469.86

The basis to the five individuals of the 4,000 shares of Tex-Penn Oil Company, acquired by them on October 31, 1918, was their proportionate share of $100,000.00.

The basis to Benedum of the shares of Tex-Penn Oil Company, received in exchange for the Sutton and Oldham County leases and the South American leases and options was $75,000.00, and the basis to Parriott was $25,000.00.

And to narrow the issues on this Request and Motion for Additional Findings and show that petitioners have concurred with these requested findings, except in regard to the basis of the Duke-Knoles leases and to the basis of the Sutton and Oldham County leases and South American leases and options, there follows copy of letter of petitioners' counsel to the Board, dated January 20, 1933, and filed with the Board as a part of this case:

"DAVIS POLK WARDWELL GARDINER & REED
(Stetson Jennings & Russell)
15 Broad Street
New York

January 20, 1933.

Re: Tex-Penn Cases

Hon. C. Rogers Arundell,
United States Board of Tax Appeals,
Washington, D. C.

My dear Judge:

At the conclusion of the trial of the Tex-Penn cases last November, you asked counsel for both parties to indicate what each believed to be the appropriate basis in respect of the three cases.

As you know, from our standpoint the matter of basis is wholly immaterial in the decision of the cases on account of the fashion in which the case has developed, and as it stands today the record is not complete on the question of basis.

Take the case of Tex-Penn, for instance. The assets which Tex-Penn owned on August 1, 1919, and which were transferred to Transcontinental consisted of its interest in the Duke-Knoles leases, certain well equipment known as Well Farm Investment, the inventory of warehouse supplies, certain leases which it purchased for cash after organization, the Oldham and Sutton County leases and the options on the South American properties. In respect of the interest in the Duke-Knoles leases, our amended petitions allege that the simultaneous subscription by the five to the Tex-Penn stock, the assignment of the 2/8ths interest in the Duke-Knoles leases, the payment of the $100,000 by the five to Tex-Penn and the repayment on the

same day of the same $100,000 to the five constituted in substance the acquisition by Tex-Penn of the 2/8ths interest in the Duke-Knoles leases in exchange for the Tex-Penn stock. If the delivery of the check and its immediate repayment is disregarded as a purely formal and futile thing, the basis to Tex-Penn of the 2/8ths interest would be the value of such interest on the date of the assignment. If the form is regarded, the basis would be $100,000.

In respect of the Well Farm Investment and the inventory of warehouse supplies, the record is clean cut. The actual cost of the Well Farm Investment was $633,828.32 (Ex. 31), and the actual cost of the inventory of warehouse supplies was $158,418.25 (Ex. 31). The record also shows that Tex-Penn acquired for cash certain leases (other than the Duke-Knoles leases, the Oldham and Sutton County leases and the options on the South American properties) for which it paid $63,223.29 (R. 471). Tex-Penn acquired the Oldham and Sutton County properties and the South American properties from Benedum and Parriott shortly before August 1, 1919, in exchange for the balance of the Tex-Penn stock, some 66,800 shares. The record is silent as to the value of such shares when issued. When Benedum and Parriott acquired the South American options, they undertook to pay $100,000. But this figure, while perhaps constituting a basis to Benedum and Parriott, does not necessarily fix the basis of the property to Tex-Penn. There is nothing in the record regarding the cost to Benedum and Parriott of the Sutton and Oldham County properties.

In respect of Benedum and Parriott, the record contains certain items of basis, but again is not complete. The basis to these two turns upon the cost to

them (or the value as the case may be) of the Tex-Penn stock which they ultimately relinquished on dissolution when they received the 1,007,834 shares of Transcontinental stock. Benedum and Parriott acquired the Tex-Penn stock in four ways: (1) on organization, (2) by cash subscription, (3) on the transfer of the Oldham and Sutton County properties and the South American properties, and (4) from Wrather, Lantz and Kirkland. If the $100,000 paid on the issue of the original shares is the basis, Benedum, who acquired 1500 shares, and Parriott, who acquired 750 shares, would have as the basis of such stock $37,500 and $18,750, respectively. On the subsequent cash subscription, Benedum received 3420 shares, for which he paid $65,500 in cash, and Parriott received 1710 shares, for which he paid $42,750 in cash. In respect of the South American properties for which the two had undertaken to pay $100,000 in the aggregate, we would not object to the allocation of $75,000 as the cost to Benedum and $25,000 as the cost to Parriott, as the Government now suggests. Benedum and Parriott each paid $15 to Wrather, Lantz and Kirkland in respect of the Tex-Penn stock acquired from this source.

This is the state of the record on the matter of basis, and, as you can see, it is not complete. But taking the several items which clearly appear of record, the aggregate of these items is as follows:

Tex-Penn Oil Company...	$955,489.86
M. L. Benedum.....	198,015.00
F. B. Parriott.....	86,515.00

In drawing your attention to these figures, we do not wish to be committed in any respect on the matter of basis, which we feel to be wholly immaterial. This I am sure you will appreciate.

Mr. Fullerton has handed to us three statements purporting to set forth the approach which the respondent now suggests in reaching the deficiencies claimed. The question of basis as the respondent now sees it is included in these statements. I presume that Mr. Fullerton either has already or will shortly provide you with copies of these statements. The bases to Benedum and Parriott set forth in these statements are made up of the original $100,000 on account of the first issue of Tex-Penn stock, the additional cash paid by each in respect of the additional shares issued, $75,000 in respect of Benedum for the South American properties, $25,000 in respect of Parriott for the South American properties, and $15 to each in respect of the Wrather, Lantz and Kirkland stock. In these statements the Tex-Penn basis is set forth as $617,978.60, characterized as 'Book Value of the Tex-Penn assets,' which is a sharp departure from the Tex-Penn figure as indicated above.

I am sending a copy of this letter to Mr. Fullerton.

Very truly yours,

MONTGOMERY B. ANGELL (signed)."

(Signed) ROBERT H. JACKSON,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:
BROOKS FULLERTON,
Special Attorney,
Bureau of Internal Revenue.

jpm 7-17-35

Denied
Jul 18 1935

(Signed) C. ROGERS ARUNDELL
Member
U. S. Board of Tax Appeals

Decision and Order of Redetermination.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.	10

This proceeding came on regularly for hearing on July 18, 1935, on respondent's proposed recomputation filed pursuant to the report of the Board promulgated August 8, 1933, and petitioner's objections thereto and proposed alternative computation. Upon consideration and in accordance with the proposal of the respondent, it is 20

ORDERED AND DECIDED that there is a deficiency in income tax for the year 1919 in the amount of $1,925,466.95.

Enter:

(Signed) C. ROGERS ARUNDELL,
Member.

Entered
Jul 18 1935 30

40

Motion to Fix Amount of Bond.

(Filed October 3, 1935.)

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

Comes now the above-named petitioner by counsel and respectfully shows to the Board as follows:

On July 18, 1935, the Board entered its decision and final order of redetermination in the above proceeding pursuant to which it was ordered and decided that there is a deficiency in the petitioner's income tax for the year 1919 in the amount of $1,925,466.95.

The petitioner is about to file a petition for review of the Board's decision by the Circuit Court of Appeals for the Third Circuit to reverse such decision and final order of redetermination. Counsel for the petitioner and counsel for the respondent are co-operating to bring on the hearing and argument on the petition for review at the earliest date possible and it is believed that the proceeding will have been argued in the Circuit Court of Appeals before December 31, 1935.

The deficiency in tax as determined by the Board, plus interest thereon at 6 per cent. per annum from February 26, 1926 (in accordance with Section 283(d) of the Revenue Act of 1926), to February 26, 1937, will amount to $3,196,275.14.

NOW, THEREFORE, petitioner respectfully moves that the Board fix the amount of the bond required to stay the assessment and collection of the deficiency in tax deter-

mined by the Board pending the final decision on the petition for review at $3,200,000.

Dated, October 3, 1935.

JOHN W. DAVIS,
Counsel for Petitioner.

Order Fixing Amount of Bond.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990.

Counsel for the petitioner having moved the Board to fix the amount of bond to be filed in the above-entitled proceeding as provided by Section 1001 of the Revenue Act of 1928, it is

ORDERED that the amount of bond be fixed at the sum of $3,250,000 with sureties to be approved by the Board.

Dated, October 8, 1935.

(Signed) C. ROGERS ARUNDEL,
(Seal) Member.

Petition for Review by the United States Circuit Court of Appeals for the Third Circuit and Assignments of Error.

(Filed October 15, 1935.)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

M. L. BENEDUM, Petitioner, against COMMISSIONER OF INTERNAL REVENUE, Respondent.	B. T. A. Docket No. 30990.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

M. L. Benedum, a resident of Pittsburgh, Pennsylvania, being aggrieved by the decision of the United States Board of Tax Appeals entered on July 18, 1935, wherein the Board ordered and decided that there was a deficiency in income taxes due from the petitioner for the calendar year 1919 in the sum of $1,925,466.95, respectfully shows unto this Honorable Court as follows:

I.

DESIGNATION OF COURT OF REVIEW.

Your petitioner is, and at all times hereinafter mentioned was, a citizen of the United States. For the calendar year 1919 the petitioner made and filed his income and profits tax returns in the office of the Collector of Internal Revenue for the 23rd District in Pennsylvania, located in the City of Pittsburgh, State of Pennsylvania, which is within the jurisdiction of the Circuit Court of Appeals for the Third Judicial Circuit.

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

Proceedings Before the Board of Tax Appeals.

The taxes in controversy are Federal income taxes upon the petitioner amounting to $1,925,466.95 for the calendar year 1919 and all of such taxes are in dispute.

The Commissioner of Internal Revenue originally determined a deficiency in the petitioner's tax for the year 1919, amounting to $1;713.85, and notified the petitioner of this determination by a notice of deficiency mailed to the petitioner on November 15, 1924. Later the Commissioner of Internal Revenue determined a deficiency in tax for the year 1919 of $12,007,315.11 and notified the petitioner of this determination by a notice of deficiency mailed to the petitioner on July 8, 1927, pursuant to Section 274 of the Revenue Act of 1926.

Within the period allowed by law the petitioner filed his petition with the United States Board of Tax Appeals in response to the notice of deficiency dated July 8, 1927. By an amended answer the Commissioner asserted an additional deficiency in petitioner's taxes and prayed that the deficiency be redetermined in the amount of $24,160,673.77, in lieu of that above stated. At the hearing of the cause before the United States Board of Tax Appeals the Commissioner abandoned and repudiated the determinations made in the notice of deficiency dated July 8, 1927, and the additional deficiency asserted in the amended answer, and contended for a different amount of tax upon an entirely different theory and different allegations of fact: Following the hearing of the cause, the petitioner called to the attention of the Board the fact that the Commissioner, upon whom rested the burden of proof in view of his repudiation of his own determinations, had not

proved nor had the Board found sufficient facts to permit a computation of the deficiency in tax except in the amount of $36,760.63. Nevertheless, the Commissioner, though afforded an opportunity, failed to adduce the proof necessary to compute the gain and the Board arbitrarily determined that there was a deficiency in the petitioner's income taxes for the year 1919 amounting to $1,925,466.95.

This is one of three cases heard and decided by the Board in a single opinion and findings of fact, namely, Tex-Penn Oil Company v. Commissioner, B. T. A. Docket No. 11539, F. B. Parriott v. Commissioner, B. T. A. Docket No. 30989, and M. L. Benedum v. Commissioner, B. T. A. Docket No. 30990. The three cases were consolidated for hearing in the Board of Tax Appeals pursuant to stipulation between counsel for the parties approved by the Board, wherein it was agreed that any and all testimony offered in the Benedum appeal would be considered as also having been offered in the two companion cases but that each case should be deemed to be that of an independent proceeding and after such consolidated hearing separate findings of fact and separate orders would be entered on each of the respective records, which was done.

Petitions for review are being filed concurrently in this court in each of the companion cases.

The Transaction in General.

On August 1, 1919, Transcontinental Oil Company, a newly chartered corporation with an authorized capital of 2,000,000 no par value shares, was the medium for the consolidation and merger of the property and business of four distinct corporations (among them Tex-Penn Oil Company), and, in addition, certain associated property interests theretofore independently owned by five individuals including the petitioner, M. L. Benedum, and F. B. Parriott.

The properties acquired by Transcontinental and the amount paid the transferors therefor were:

Source		*Paid in Exchange Therefor*
Group I.		
Acquired from Tex-Penn (to be transferred free of all indebtedness):		
(a) 2/8 interest in Duke-Knoles leases.		1,007,834 shares of Transcontinental stock
(b) Miscellaneous undeveloped leases in Texas and Louisiana and options on South American properties.		
Group II.		
Acquired from five individuals, Benedum, Parriott, Wrather, Lantz and Kirkland:		
(a) 5/8 interest in Duke-Knoles leases.		$9,000,000 cash
Group III.		
Acquired from Pittsburgh-Texas Oil and Gas Company:		
(a) All assets and liabilities.		156,833 shares of Transcontinental stock
Group IV.		
Acquired from Riverside-Western Oil Company and its subsidiary:		
(a) Gasoline plants and related blending and marketing facilities.		$1,250,000 cash and 41,667 shares of Transcontinental stock
Group V.		
Acquired from Riverside Eastern Oil Company and its subsidiaries:		
(a) Gasoline plants and related blending and compounding plants, distributing stations and marketing facilities and three small producing oil and gas leases in Ohio and West Virginia and miscellaneous assets.		$1,250,000 cash and 41,667 shares of Transcontinental stock
Group VI.		
Acquired from bankers cash and commitments amounting to	$20,225,000	
Less cash paid in to August 7, 1919 (of which $11,500,000 was paid out forthwith in acquiring the above properties	12,370,000	750,000 shares of Transcontinental stock
Unpaid commitment	$ 7,855,000	

The questions presented here arise out of the transactions pertaining to the formation of Transcontinental Oil Company, and more particularly to its acquisition of the properties of Tex-Penn (in exchange for 1,007,834 shares) and the lease interests of the five associated individuals (in exchange for $9,000,000), as noted in Groups I and II above. Identical questions are raised in the two companion cases involving F. B. Parriott and Tex-Penn Oil Company. A brief statement of these questions follows:

The Questions Involved.

Reorganization Issue:

First, the petitioner maintains that the receipt in 1919 of certain shares of Transcontinental Oil Company stock in exchange for shares of Tex-Penn stock was an exchange in connection with a non-taxable reorganization within the meaning of Section 202(b) of the Revenue Act of 1918, and the recognition of any gain from the receipt of such shares was deferred until such shares were resold, whereas the Board found that the exchange gave rise to an immediate gain.

Under the Revenue Act of 1918, no gain or loss was "deemed to occur" from an exchange "in connection with the reorganization, merger, or consolidation of a corporation" where a person "receives in place of stock or securities owned by him new stock of no greater aggregate par or face value." The Commissioner's Regulations interpreting this provision—regulations which have been applied for more than fifteen years—provided that where corporation B sold its property to corporation A and B dissolved, no taxable income is received by either of the corporations or their stockholders "provided the sole consideration received by B and its stockholders * * * is stock or securities of A."

It is not disputed in the present case that the petitioner received in place of his Tex-Penn stock certain shares of Transcontinental stock of no greater aggregate par or face value than the Tex-Penn stock surrendered, nor is it disputed that the transaction whereby Tex-Penn transferred its assets to Transcontinental in exchange for stock of the latter which was distributed to the petitioner and Parriott upon the surrender of their Tex-Penn stock was a "reorganization, merger, or consolidation" within the meaning of the 1918 Act. As part of the merger plan, however, it was agreed that the assets of the Tex-Penn Oil Company were to be transferred free of debt and the five individuals agreed that they would contribute to Tex-Penn from the $9,000,000 which they were to receive for their individually owned interest in the Duke-Knoles leases sufficient cash for this purpose. An estimate was made and $350,000 was determined to be sufficient, and that amount was paid direct to Tex-Penn Oil Company by the Transcontinental Oil Company and the remainder of the $9,000,000 was paid direct to the five individuals. The Commissioner asserted and the Board held, contrary to the evidence, as the petitioner maintains, that such payment of $350,000 in cash made by Transcontinental to Tex-Penn was "consideration" for the transfer of Tex-Penn properties to Transcontinental, and the Board, therefore, concluded that the petitioner, M. L. Benedum, and his co-stockholder, Parriott, as well as Tex-Penn, were taxable on account of the receipt of the Transcontinental stock, although confessedly neither of the stockholders received any part of the $350,000 in liquidation of Tex-Penn assets.

In its report the Board also indicated that "some part" of the cash paid by Transcontinental to the petitioner and Parriott, and their associates Kirkland, Lantz & Wrather, constituted "payment" for their Tex-Penn stock. Although, on the settlement of its order, the Board's atten-

tion was called to this indefinite statement in its report and the implications flowing therefrom, the Board refused to find the precise amount of cash so received "in payment" and inconsistently treated the entire amount of cash involved as received in payment for petitioner's individual interest in the Duke-Knoles leases for the purpose of computing the limitation of surtax upon the sale of discovery oil property.

The facts were (1) that the sole consideration passing to Tex-Penn for the conveyance of its properties was stock of Transcontinental and (2) the whole of the $9,000,000 in cash was paid over for the account of the five individuals as consideration for the concurrent transfer to Transcontinental of their reserved individual interests in the associated Duke-Knoles leases, and (3) out of this cash belonging to themselves the five individuals diverted and caused to be paid over by Transcontinental to Tex-Penn the sum of $350,000 in order to enable it to convey its properties free and clear of all liabilities. The Board's holding to the contrary was made despite the clear and unequivocal testimony of every living participant in the transaction, including J. M. Holliday, who acted on behalf of Transcontinental and the bankers (see Group VI above) in assembling the properties and in disbursing the consideration to be paid by Transcontinental for such properties, and F. B. Parriott, who was president of Tex-Penn and represented it and the five individuals in the negotiations and in accomplishing the transfer of the Tex-Penn and the individually owned properties to Transcontinental and who received and distributed the stock and monies paid for the two property interests. This testimony is definitely corroborated by the explicit records and books of account kept in the ordinary course of business covering the receipt and distribution of the $9,000,000 in cash for the credit and use of the five individuals.

The testimony established without contradiction the express agreement throughout the negotiations that the Tex-Penn assets were to pass to Transcontinental free and clear of all liabilities; and that Tex-Penn did not have on hand or available sufficient funds therefor. In order to supply the necessary funds the five individuals agreed that Parriott should deduct from the $9,000,000 proceeds from the sale of their individual leasehold interests a sum sufficient for the purpose. Parriott made such deduction, advised Holliday thereof and requested the latter to instruct Transcontinental to pay over directly to Tex-Penn the sum of $350,000 to enable it to pay its liabilities, which was done.

Certain letters and agreements pertaining to the consolidation characterized this $350,000 payment as consideration for the transfer of the Tex-Penn properties. Every living person participating in the transaction testified that such designation was in fact erroneous and that the sole consideration for the Tex-Penn assets was Transcontinental stock. The Commissioner offered no evidence to refute this and the Board's finding to the contrary was unsupported by the evidence.

Likewise there was no evidence to support the indefinite statement made in the Board's report that "some part" of the cash received by the petitioner and Parriott for the transfer to Transcontinental of their individual interests in the Duke-Knoles leases constituted "payment" for their Tex-Penn stock. The computation of the deficiency approved by the Board is inconsistent with its assertion in this respect.

No "Fair Market Value" Issue.

If the transaction in which the petitioner received Transcontinental shares in 1919 was not within the non-recognition provisions, the petitioner maintains that such stock did not, in law or in fact, on August 1, 1919, have any

"fair market value," for under the Revenue Act of 1918, the receipt of property on exchange gives rise to a tax only if the value of the property received is ascertainable with reasonable certainty and realizable in cash or its equivalent.

Section 202(b) of the Revenue Act of 1918 provided that when property is exchanged for other property the property received

> "* * * shall for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value, if any."

Under the Commissioner's regulations promulgated under this Section, an exchange of property for property is not immediately taxable unless the exchange is a "change in substance" and unless that which is received is "the equivalent of cash." Under the decisions property is not the equivalent of cash unless its fair market value may be ascertained with reasonable certainty. If such ascertainment is not possible, the taxes are postponed until the property received is sold or otherwise disposed of, when the amount of gain or loss can be determined with certainty.

The bankers, who were to provide the $20,000,000 necessary to finance Transcontinental did not propose to hold all the shares which they would receive but intended to resell a block of 500,000 shares to the public. To accomplish this, the bankers were to organize a syndicate, and in order to protect the syndicate in its operations the bankers exacted an agreement as a condition of financing the transaction that the 1,007,834 shares of Transcontinental which the petitioner and Parriott would receive on distribution by Tex-Penn should not be sold or disposed of directly or indirectly during the duration of the bankers' syndicate.

The syndicate came into existence prior to the issuance of such 1,007,834 shares and continued throughout the taxable year without interruption and until terminated by the bankers on January 8, 1920, the year following the transaction here involved. In compliance with such restriction neither Benedum nor Parriott transferred or in anywise dealt with such Transcontinental shares until after the termination of the syndicate in 1920.

In order to give rise to income within the meaning of the 16th Amendment, the property received must have an "exchangeable" value available to the recipient for his separate use, benefit and disposal and subject to his unfettered command. The petitioner maintains that the existence of the restriction upon the sale or other disposition of Transcontinental stock in and of itself deprived the property of any characteristic of taxable income as a matter of law. The petitioner also maintains that if the restriction in and of itself was not sufficient to negative as a matter of law the realization of income, nevertheless, the existence of the restriction upon the stock and the Board's findings indicating the uncertainty and hazards confronting the Transcontinental Oil Company on August 1, 1919, as a going concern, when taken together, deprive the stock as such of any "fair market value" within the meaning of Section 202(b) quoted above.

Numerous witnesses including some who were familiar with the properties of Transcontinental and who were experienced as executive officers of large oil companies, or as bankers, or geologists, or appraisers of oil property, or appraisers of the shares and securities of oil companies, or as stock and security brokers, convincingly testified for the petitioner that a block of Transcontinental stock of the size received by Tex-Penn and distributed by it to the petitioner and Parriott had no ascertainable fair market value, due consideration being given to all the facts and circumstances, including the restriction to which the shares

were subject; the assets of the corporation, including the unpaid bankers' commitments which stood committed to the use and hazards of the enterprise, the fact that the company comprised an aggregation of new, and in large part, unrelated properties; the then uncertain value and prospects of the Duke-Knoles leases which admittedly formed the nucleus for the operation of the whole enterprise; the lack of earnings record on the part of the new company, as well as unsatisfactory earnings history of the old companies; the inability of the petitioner, due to conditions surrounding the current sales of this stock upon the Exchange, to readily realize therefrom any amount ascertainable with fair certainty.

Despite this testimony, the Board of Tax Appeals, without making specific findings of fact with respect to the value of certain of the constituent properties of the corporation, concluded that the shares did have a fair market value. This conclusion is contrary to law and is unsupported by the evidence.

In disposing of this issue, the Board stated:

> "We deem it unnecessary to this report to restate the facts in detail or to review and criticize the opinions of the many witnesses called by the parties. In the findings of fact agreed values are indicated for certain assets. As to the Duke-Knoles leases, after careful study of the facts and opinions presented, we are convinced that they possessed a substantial value. In arriving at the value of the stock we have given such weight as in our judgment should be given, to the several factors bearing thereon. We do not assign a specific value to each nor do we rely solely on the value of the assets."

In attempting to defend its conclusion the Board went on to say:

> "In the formation of a judgment of value the length of each step taken in reaching the ultimate result may not be measured with nicety nor can the weight of each contribution be precisely determined. The value which we have found is less than that asked by the Government, much less than the market price, and far less than the optimistic opinions of petitioners as expressed at about the basic date. It represents our reasoned judgment of the fair market value of the stock after studied consideration of all pertinent facts and applicable factors."

The Board did not merely fail or omit to find and state the basis and reasoning underlying its determination; it expressly refused so to do, contrary to law. Thus the petitioner and this court is left entirely without knowledge of the facts considered or the reasoning employed, or the sources from which the Board deduced a result so in conflict with the testimony adduced.

Valuation Issue:

Assuming that the shares of Transcontinental stock so received by Tex-Penn, the petitioner and Parriott had a fair market value on August 1, 1919, the petitioner asserts that the Board committed error in finding that such value was $7 a share for the entire block of 1,007,834 shares.

The petitioner adduced the testimony of numerous well qualified experts which showed that such stock had no ascertainable fair market value, within the purview of the Revenue Act of 1918, and hence did not offer any testimony

tending to fix a specific value either for the shares en bloc or upon a per share basis. The Commissioner's experts gave their opinion that the stock was worth $10.00 a share subject to the restriction upon sale and $12.00 a share without the restriction.

The Board's report stated that no "particular method of reasoning is authoritative" in problems of valuation and that no particular class of persons were to be recognized as experts, continuing—

> "Where men of sound judgment having the same facts before them reach such widely varying results, it becomes our duty to undertake *independently* the problem of fixing the fair market value of the stock." (Italics ours.)

In fixing the value of the shares the Board then made the following cryptic and arbitrary statement:

> "Approaching the problem at hand in the light of these somewhat obvious observations, considering, testing and weighing the manifold facts in evidence, and the inferences to be drawn therefrom, applying to the task our best judgment based on experience in many cases involving similar questions, we have determined that the fair market value of the stock of Transcontinental Oil Co. received by petitioners in the transaction before us was $7 per share (Opinion, p. 58)."

This constitutes the entire utterance of the Board upon this issue; and the figure propounded is irreconcilable with any testimony either for the petitioner or the respondent. The Board thus puts itself forward, not as a judicial tribunal attempting to find the facts upon the basis of the testimony and all evidence of record, but rather as its own

expert, asserting that it is not confined to a consideration of the facts of record or the inferences to be drawn from such facts but is under duty to exercise an *independent* judgment based on experience in other cases involving different facts.

In reaching its valuation the Board thus rejected the facts and testimony of record and arbitrarily substituted its own independent judgment to reach a compromise figure which was wholly unsupported by any of the testimony or facts of record. There is nothing in the record to show that the Board itself had experience or facts and knowledge upon which it might predicate a judgment of its own after ignoring the opinion of prominent witnesses who were familiar with the properties acquired by Transcontinental Oil Company and knew its history. The Board's decision, therefore, is based entirely upon conjecture and it committed reversible error in arbitrarily disregarding the affirmative and positive testimony of witnesses qualified to express an opinion.

The action of the Board is made all the more arbitrary by reason of the fact that it carefully refrained from stating the method of reaching the figure and refused to assign specific values to the properties acquired by Transcontinental. The petitioner is thus left without knowledge of the basis of the Board's valuation, except that it is apparent from the Board's report that it stressed certain superficial factors having no bearing whatever upon the actual fair market value of the stock.

The Burden of Proof Issue:

Even if the Board's conclusions on the reorganization and valuation issues should be sustained, a further question remains. In determining a capital gain, two factors must be fixed with definiteness, namely, (1) the amount received for the properties transferred, and (2) the cost

or "basis" of such properties. Ordinarily the burden rests upon the taxpayer to overcome the presumption of correctness accorded to the Commissioner's determination as stated in his formal notice of deficiency. Where, however, such determination is shown to be erroneous either by the facts of record or by the Commissioner's own repudiation or abandonment of his determination in any of its essential elements, both of which are present here, all probative force of the presumption falls and the burden of establishing not only that a taxable gain has occurred but the precise amount thereof rests upon the Commissioner. The petitioner maintains that the Commissioner has failed to sustain the burden now resting on him, and, inasmuch as the facts of record do not permit the fixation of one or more of the essential factors required to establish the basis or cost (and in consequence the amount of the gain), the Board erred in its determination of the gain realized.

In the notice of deficiency mailed to the petitioner on July 8, 1927, the Commissioner made certain determinations as to the cost of the Tex-Penn stock surrendered and the lease interests sold by the petitioner and the amounts received therefor. The amount of the receipts so far as they consisted of Transcontinental stock were fixed at $47.55 per share. In arriving at the tax in the notice of deficiency the Commissioner allowed the taxpayer a cost of $3,214,285 for his interest in the Duke-Knoles leases and $16,050,550 for his Tex-Penn stock. During the course of the trial the Commissioner through his counsel abandoned the determination as to the amount received by the petitioner and repudiated the determination as to the cost of the Tex-Penn stock surrendered and the cost of the lease interests sold, thus conceding error in both costs and receipts. In addition, the facts of record clearly show that the Commissioner's determination of the amount of the deficiency was arbitrary and excessive. The burden of

establishing a correct figure therefore rested upon the Commissioner.

As to the cost or basis figures, the Board made no findings nor did the Commissioner offer any proof as to the basis to the petitioner of two blocks of his Tex-Penn stock. In 1918, the petitioner acquired the first block of 750 shares in exchange for an interest in the Duke-Knoles leases. The basis of this block of stock is its fair market value at the time the shares were issued. The record is entirely devoid of any fact showing such basis.

The second block of Tex-Penn stock, consisting of an undivided interest in 66,880 shares, was acquired in 1919, in exchange for certain South American and Sutton-Oldham County properties transferred to Tex-Penn. The basis of this block of Tex-Penn shares was its fair market value at the time the shares were issued. Again, the record is devoid of any facts showing the basis of this block of shares.

Furthermore, as to the receipts figure in the computation, the findings which the Board made apparently do not definitely fix the value of the consideration received on account of the Tex-Penn-Transcontinental transaction. It is true that the Board found that Tex-Penn received 1,007,834 shares of Transcontinental stock valued at $7 a share, and $350,000 in cash. But the Board also stated in the course of its opinion that "some part" of the cash which the petitioner received on account of the transfer of his reserved interest in the Duke-Knoles leases was "payment" for the Tex-Penn stock. The Tex-Penn stock was surrendered *to Tex-Penn* as part of the corporate merger or consolidation betwen Tex-Penn and Transcontinental, and any cash which the petitioner received either as consideration for, or in payment of, his Tex-Penn stock could have come only by way of Tex-Penn in liquidation. Failing to fix the amount of this "some part," it is not

possible under the Board's opinion to determine the exact amount of the receipts figure.

During the course of the trial and before the Board entered its final order the petitioner called, to the attention of the Board and the Commissioner the state of the record in respect both of the amount of the receipts and the cost to the petitioner of his Tex-Penn shares. Although on notice and given an opportunity, the Commissioner failed to offer any evidence on these points. The Board, over the petitioner's specific objection, arbitrarily approved a computation submitted by the Commissioner which ignored these defects in the record. Since the burden of proof was on the Commissioner to establish these factors, the Board's final order was fundamentally errpneous.

The Riverside-Western Issue:

There is a minor question in the case as to whether the Board erred in upholding the Commissioner's allocation of a cost of $15.00 a share to part of the petitioner's Riverside-Western preferred stock surrendered for retirement in 1919.

In 1919, the petitioner was the owner of 4855 shares of Riverside-Western preferred stock. These shares had been issued to petitioner at the time of the purchase with a bonus of an equal number of shares of common stock of Riverside-Western Oil Company. The petitioner had paid $25.00 for each unit of common and preferred shares, but made no allocation of cost between the preferred and common on his books. In 1919 the petitioner surrendered his Riverside-Western preferred and received cash amounting to $25.00 for each share. He did not dispose of his Riverside-Western common until 1920. In computing the profit to the petitioner upon the retirement of his preferred stock, the Commissioner arbitrarily allocated to the preferred

$15.00 a share of the total $25.00 cost for a unit of common and preferred.

In such circumstances, the Commissioner's regulations require that the purchase price of the common and preferred "be fairly apportioned" between the two classes of stock, but where it is impracticable to make such an allocation, the recognition of any gain is postponed until the entire cost of both classes of shares has been recovered. The petitioner adduced the testimony of a witness who had examined brokers' records listing transactions in the common and preferred stocks and testified that it was not possible to make an allocation of cost between the two classes of stock. The Board erroneously held that this evidence was insufficient to overcome the *prima facie* correctness of the Commissioner's arbitrary allocation, again failing to recognize that the burden of proof shifted to the Commissioner as soon as the arbitrary character of the Commissioner's determination was established.

III.

Assignments of Error.

The petitioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding that the transaction in which the petitioner acquired shares of Transcontinental stock was not a non-taxable reorganization within the provisions of Section 202(b) of the Revenue Act of 1918 and Article 1567 of the Regulations issued thereunder.

2. The Board erred in failing to hold that the sole consideration received by Tex-Penn Oil Company in exchange for its assets and distributed to the petitioner upon the surrender of his Tex-Penn stock consisted of shares of Transcontinental stock.

3. The Board erred in holding that the $350,000 paid by Transcontinental to Tex-Penn on or about August 1, 1919, constituted part of the "consideration" received by Tex-Penn in exchange for its assets.

4. The Board erred in finding that the consideration received by Tex-Penn on or about August 1, 1919, in exchange for its assets consisted in part of $350,000 in cash for the reason that such finding is not supported by the evidence.

5. The Board erred in failing to hold that the $350,000 paid by Transcontinental to Tex-Penn on or about August 1, 1919, was part of a sum of $9,000,000 cash which Transcontinental had agreed to pay to the five individuals, Benedum, Parriott, Kirkland, Lantz and Wrather in consideration for the transfer by them to Transcontinental of their individually reserved interests in the Duke-Knoles leases, and which was paid over by Transcontinental to Tex-Penn out of such $9,000,000 at the express direction of the five.

6. The Board erred in finding that the consideration received by the five individuals, Benedum, Parriott, Kirkland, Lantz and Wrather, on the sale to the Transcontinental Oil Company of the reserved 5/8ths interest in the Duke-Knoles leases was $8,650,000 and not $9,000,000.

7. The Board erred in holding that the petitioner realized taxable gain on account of the surrender of his Tex-Penn stock in exchange for stock of Transcontinental Oil Company.

8. The Board erred in holding that "some part" of the cash received by the petitioner on or about August 1, 1919, constituted "payment" for the petitioner's Tex-Penn stock.

9. The Board erred in holding that the cash received by Kirkland, Lantz and Wrather from Transcontinental was consideration for both their stock in Tex-Penn and their interest in the Duke-Knoles leases for the reason that such finding is unsupported by the evidence.

10. The Board erred in holding that the consideration received by Kirkland, Lantz and Wrather was material or determinative in fixing the consideration received by the petitioner and Parriott on the surrender of their Tex-Penn stock in the merger.

11. The Board erred in failing to hold that the shares of Transcontinental stock paid Tex-Penn for its assets and distributed to the petitioner and Parriott were at no time during the calendar year 1918 subject to the separate use, benefit or disposal of either the petitioner or the other parties and gave rise to no taxable income for that year.

12. The Board erred in finding that the Duke-Knoles leases "on or about August 1, 1919, had a substantial fair market value" for the reason that such finding is unsupported by the evidence.

13. The Board erred in concluding that the Duke-Knoles leases "had a very substantial value when acquired by Transcontinental" for the reason that such conclusion is not supported by the Board's findings.

14. The Board erred in failing to hold that the Duke-Knoles leases on or about August 1, 1919, did not have any fair market value then presently realizable in cash or its equivalent and ascertainable with fair certainty.

15. The Board erred in failing to find that the 1,007,834 shares of Transcontinental stock acquired by the petitioner

and Parriott jointly on or about August 1, 1919, subject as they were to a binding restriction against any sale or disposition, had no fair market value then presently realizable in cash or its equivalent and ascertainable with fair certainty.

16. The Board erred in finding that the fair market value of the 1,007,834 shares of Transcontinental stock issued to the petitioner and Parriott jointly on or about August 1, 1919, was $7 per share for the reason that such finding is unsupported by the evidence or by other findings of the Board.

17. In determining that the 1,007,834 shares of Transcontinental stock on August 1, 1919, had a fair market value of $7 a share, the Board erred in failing to give due effect to the agreement exacted from the petitioner that the shares would not be sold or disposed of during the operation of the banking syndicate.

18. The Board erred in fixing a fair market value of $7 a share for the Transcontinental stock, without indicating the findings or testimony upon which it relied, or the reasoning or method employed in ascertaining such figure.

19. The Board, sitting in a judicial capacity upon trial of a contested valuation question, erred in undertaking independently to fix a fair market value.

20. The Board erred in rejecting the testimony of qualified experts as to the fair market value (or lack of such value) of Transcontinental stock on August 1, 1919, and substituting its own independent judgment as to such value based upon its experience in other cases, without having any independent knowledge of the value of such stock or

any facts or knowledge of its own upon which it might predicate a judgment.

21. The Board of Tax Appeals erred in admitting as evidence of the value of the Duke-Knoles leases the following testimony of the witness W. G. Merrill:

"My name is W. G. Merrill of Stephenville, Texas. My occupation is trader, cattle trader. In 1919, I lived at Stephenville and had certain transactions in oil properties. I bought an acre lease from Mrs. B. I. Terry. It was south of Ellison and east of the Terrell tracts. Just east of the cemetery—a little bit of north of east of the cemetery—200 yards from the cemetery. There was a lane between this lot and the Terrell tract.

Q. What did you pay for that tract?

Mr. Adams: * * * Petitioner objects to the testimony on the ground that it is not competent or admissible in proof of valuation, no basis for comparison of the properties referred to by the witness having been shown with the properties at issue in this case.

The objection was overruled and an exception allowed.

A. $10,000—in cash.

I sold it the following day to Ross & Hoover in Fort Worth. They paid me $20,000 in cash; the date of my purchase was along in June, 1919, I think."

22. The Board of Tax Appeals erred in admitting as evidence of the value of the Duke-Knoles leases the testimony of numerous witnesses regarding various single

isolated transactions of purchase or sale of oil and gas leases covering small tracts of land, located at distances varying from one to four miles from the Duke-Knoles leases, without requiring the respondent to establish the comparability thereof to the Duke-Knoles leases, such evidence having been in each instance objected to by counsel for the petitioner on the ground that comparability had not been established and the testimony was not competent proof of value, which evidence is too voluminous to quote in full as part of this assignment of error but will appear in full in the statement of evidence to be filed herein.

23. The Board erred in holding that upon the state of the record the burden of proving the amount of the asserted capital gain rested upon the petitioner, whereas upon the state of the record such burden rested upon the Commissioner and the Commissioner has failed to sustain the burden.

24. The Commissioner having failed to sustain the burden, the Board erred in entering its final orders of determination of deficiencies when the facts of record are not sufficient to determine the cost or basis of the Tex-Penn stock which the petitioner surrendered, or the amounts received therefor.

25. The Board erred in ordering and deciding that there is a deficiency in the petitioner's income taxes for 1919 amounting to $1,925,466.95, as computed by the respondent, when such computation, in determining the gain realized by the petitioner upon the surrender of his Tex-Penn stock did not allow the petitioner the benefit of the cost of such stock.

26. The Board erred in ordering and deciding that there is a deficiency in petitioner's taxes for 1919 amounting to $1,925,466.95 for the reason that the Board's findings are insufficient to sustain such decision.

27. The Board erred in allocating the cost of $15.00 per share to the Riverside-Western preferred stock surrendered by the petitioner in 1919.

28. The Board erred in failing to find that it is impracticable to make an allocation of cost to the Riverside-Western preferred stock surrendered by the petitioner in 1919, and in failing to postpone the recognition of gain upon the retirement of such stock until the entire cost of certain preferred and common shares had been recovered.

29. The Board erred in finding a deficiency in income taxes due from the petitioner for the calendar year 1919 in the amount of $1,925,466.95, or in any amount other than shall appear proper upon the record after exclusion of all gains alleged to have arisen out of petitioner's receipt of the shares of Transcontinental stock upon dissolution of Tex-Penn Oil Company and to have arisen out of the receipt of moneys in redemption and retirement of the preferred stock of Riverside-Western Oil Company.

WHEREFORE, your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the said Board to enter an order that the deficiency in the income and profits taxes of the petitioner for the year 1919 is in such amount as shall appear proper upon the record after exclusion of all asserted gains in respect of the receipt by petitioner of shares of Transcontinental Oil Company stock upon the dissolution of Tex-

Penn Oil Company and in respect of all the moneys received in payment and redemption of shares of preferred stock of Riverside-Western Oil Company; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper in accordance with law.

JOHN W. DAVIS,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN W. DAVIS, being duly sworn, deposes and says: I am one of the attorneys for the petitioner in this proceeding; I have read the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for the purpose of delay and I believe the petitioner is justly entitled to the relief sought.

JOHN W. DAVIS.

Subscribed and sworn to before me
this 14th day of October, 1935.

WM. H. BRUDER,
Notary Public,
Bronx County No. 122.
Certificate filed in New York County No. 611.
Bronx County Register's No. 126B37.
New York County Register's No. 7B347.
Commission expires March 30, 1937.

(Seal)

Notice of Filing Petition for Review.

(Filed October 15, 1935.)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	B. T. A. Docket No. 30990.

To:

COMMISSIONER OF INTERNAL REVENUE,
Internal Revenue Building,
Washington, D. C.

ROBERT H. JACKSON, Esq.,
Assistant General Counsel for the
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

You are hereby notified that on the 15th day of October, 1935, a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above-entitled case was filed with the Clerk

of the Board. A copy of the petition and assignments of error as filed is attached hereto and served upon you.

Dated, October 15, 1935.

JOHN W. DAVIS,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

Receipt of the foregoing notice of filing and service of a copy of the petition for review and assignments of error is hereby acknowledged this 15th day of October, 1935.

ROBERT H. JACKSON,
Assistant General Counsel
for the Bureau of Internal Revenue.

Bond.

(Lodged October 15, 1935.)

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON, D. C.

M. L. BENEDUM, Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Appellee.	Docket No. 30990.

KNOW ALL MEN BY THESE PRESENTS that I, M. L. Benedum, as principal, the petitioner above named, am held and firmly bound unto the above named Commissioner of Internal Revenue and/or the United States of America, in the sum of $3,250,000, to be paid to the said Commissioner of Internal Revenue and/or the United States of America for the payment of which well and truly to be made I do hereby bind myself and my successors and assigns firmly by these presents.

Sealed with my seal and dated the 10th day of October, in the Year of our Lord One Thousand Nine Hundred and Thirty-five (1935).

WHEREAS, the above named, M. L. Benedum, is filing or is about to file with the U. S. Board of Tax Appeals, a petition for review of the Board Decision in respect of the tax liability of the above petitioner for the calendar year 1919, by the Circuit Court of Appeals of the United States for the Third Circuit to reverse the final order of redetermination rendered in the above entitled cause.

NOW, THEREFORE, the condition of this Obligation is such, that if the above named M. L. Benedum shall file his peti-

tion for review and shall prosecute said petition for review to effect and shall pay the deficiency as finally determined, together with any interest, additional amounts or additions to the tax provided for by law, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Seal) M. L. BENEDUM.

Attest:
S. A. McCASKEY.

Approved by:

.....
Member United States Board of Tax Appeals.

October , 1935.

Order.

The attached Bond, executed by M. L. Benedum, the taxpayer, as principal, in the sum of $3,250,000, has been presented to the Board in connection with the approval of the said Bond in the Appeal to the United States Circuit Court of Appeals for the Third Circuit of M. L. Benedum, Docket No. 30990, before the United States Board of Tax Appeals.

After due consideration, the Board declines to approve the said Bond, to which ruling of the Board the petitioner excepts, and the exception is allowed.

Dated at Washington, D. C., this 15th day of October, 1935.

EUGENE BLACK,
(Seal) Member,
United States Board of Tax Appeals.

Statement of Evidence.

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	B.T.A. No. 30990

The Statement of Evidence as approved and settled by the Board herein is identical with the Statement of Evidence settled and approved in the companion case of Tex-Penn Oil Co. v. Commissioner (B. T. A. Docket No. 11539), and printed in full in the printed Transcript of Record therein at pages 600 to 2023, except pages 737 to 740, inclusive, which are blank in the Tex-Penn Transcript. Such Statement of Evidence appearing in the Tex-Penn Transcript is hereby referred to and incorporated as part of the record herein but is omitted from reprinting in this record pursuant to stipulation of the parties approved by the Court.

In addition to the Statement of evidence so referred to and incorporated herein, the following pages 737 to 740, inclusive, constitute the Statement of Evidence upon the issue pertaining to petitioner's Riverside Western preferred stock:

PROCEEDINGS RE BENEDUM'S RIVERSIDE WESTERN STOCK.*

Thereupon counsel for the petitioner Benedum offered and there was received a stipulation numbered Stipulation No. 5, pertaining to the cost of certain shares of stock of the Riverside Western Oil Company acquired by the petitioner Benedum. Such stipulation is as follows:

STIPULATION No. 5.

It is hereby stipulated by and between petitioner and respondent, by their respective attorneys, that the petitioner Benedum acquired by purchase certain preferred stock of the Riverside Western Oil Company on the dates hereinafter specified at a cost hereinafter specified:

Date	*Preferred Stock Acquired*	*Cost of Stock*
4/14/16	60	$ 1,087.50
4/18/16	50	906.25
4/18/16	120	2,175.00
4/27/16	48	1,059.38
5/16/16	8	195.50
5/20/16	40	725.00
5/24/16	26	471.25
6/27/16	155	2,654.38
8/10/16	100	1,725.00
8/16/16	50	926.25
11/13/16	50	850.00
11/23/16	8	132.00
10/16/17	25	353.13
Totals	740	$13,260.64

It is further stipulated that on July 13, 1916, petitioner acquired by purchase from the Riverside Western Oil Company 2,115 shares of preferred and 2,115 shares of common, which common stock came as a bonus with such preferred stock, for which stock the petitioner paid to the Riverside Western Oil Company the sum of $52,875. The respective cost of these preferred and common shares was not segregated on the books of the petitioner.

It is further stipulated that on April 17, 1917, petitioner acquired from the Riverside Western Oil Company 1,696 shares preferred and 1,696 shares common, which common stock came as a bonus with such preferred stock, for which stock the petitioner paid to the Riverside Western Oil Company $42,400. The respective cost of these preferred and common shares was not segregated on the books of the petitioner.

It is further stipulated that on April 17, 1917, the petitioner acquired from the Riverside Western Oil Company 1,160 shares of its preferred stock and 1,160 shares of common stock, which common stock came as a bonus with such preferred stock, for which the petitioner paid the Riverside Western Oil Company $29,000. The respective cost of these preferred and common shares was not segregated on the books of the petitioner.

It is further stipulated that on the dates hereafter stated the petitioner sold certain units of preferred and common stock of the Riverside Western and received for such units an aggregate of $3,050.:

Date	*Number of Shares Preferred*	*Number of Shares Common*	*Price Received on Sales Units*
May 31, 1917	60	60	$1,500.00
June 1, 1917	4	4	100.00
June 22, 1917	8	8	200.00
July 11, 1917	50	50	1,250.00
	122	122	$3,050.00

It is further stipulated that the above 122 shares of preferred and common so sold for an aggregate of $3,050 constituted part of the lots of preferred and common, the acquisition of which is set forth above.

It is further stipulated that the petitioner in 1919 surrendered to the Riverside Western Oil Company 5,589 shares of preferred stock, representing the difference be-

tween his preferred stock acquisition and his preferred stock sales as set forth above, and was paid therefor, in retirement of such preferred stock at par, $25 per share, or an aggregate of $139,725.

EDWARD B. KELLY, a witness for petitioner, was sworn and testified as follows:

Direct examination.

My name is Edward B. Kelly; I live in Pittsburgh. My occupation is tax adviser to the Benedum-Trees interests. I also advise Mr. Benedum. My original education in tax matters was was the Sheffield Scientific School for four years and then I was employed by the Bureau of Internal Revenue.

In the course of my employment I am familiar with the original books of account of M. L. Benedum. I have made an examination of such books.

Q. In this Stipulation No. 5, which I just offer, it appears that the petitioner Benedum on July 13th, 1916, purchased from the Riverside Western Oil Company some 2,115 shares of preferred stock of that company, and acquired an equal amount of common stock which came to him as a bonus with such preferred stock, for which he paid in the aggregate a sum of $52,875. Again on April 17th, 1917, the petitioner Benedum purchased two blocks of preferred stock in the Riverside Western, one of 1,696 shares, which was accompanied by a similar number of shares of bonus common; the other 1,160 shares, which was accompanied by a similar number of bonus common, paying in the aggregate for such two lots $71,400.

It is further stipulated in respect to these three blocks of stock that the respective cost of the preferred and the common shares was not segregated on the books of the petitioner. Have you, Mr. Kelly, made an examination with a view of determining if possible the market value of the common and the preferred on those respective dates for the purpose of allocating the cost? A. I have.

Q. What was the extent of your investigation? A. I found that the stock was not traded in on the large exchanges, and that the only dealings were on what was known as the Pittsburgh curb, which is not the Pittsbugh Exchange proper. I found only a few transactions * *. * Most of those were in the one stock, the preferred. * * *

The extent of my investigation was an examination of the records of James E. Bennett, brokers of Pittsburgh, which contained all the records of the transactions in that stock on or about the respective dates.

I found that this Western preferred and common was closely held. On or about the two material dates, July 13, 1916, and April 17, 1917, I found a few isolated transactions which developed to be a selling out by minority stockholders who desired to dispose of their stock and merely asked if they could find a buyer. There were some sales of both common and preferred, but for the most part they were preferred. In view of the results of my investigation I was unable to allocate the cost to Mr. Benedum of the common and preferred as a unit between the two classes of stock.

Stipulation Regarding Statement of Evidence and Exhibits.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	No..... October Term, 1935. (B.T.A. No. 30990)

IT IS HEREBY STIPULATED by and between the parties through their respective counsel that the foregoing statement of evidence in narrative form, the foregoing printed exhibits and the exhibits therein recited as contained in the folder of unprinted exhibits is a statement of all of the material evidence adduced at the hearing before the United States Board of Tax Appeals and the same is approved by the undersigned as attorney for the petitioner on review and by the undersigned Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue, respondent on review.

Dated: October 23, 1935.

J. C. ADAMS,
Attorney for Petitioner on Review.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Approval.

The foregoing statement of evidence in narrative form, the foregoing printed exhibits and the exhibits therein recited as contained in the folder of unprinted exhibits is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 24 day of October, 1935.

(s) C. ROGERS ARUNDELL,
Member, United States Board of Tax Appeals.

Stipulation for Transmission of Certain Exhibits Without Printing.

(Filed October 23, 1935.)

IN THE

UNITED STATES BOARD OF TAX APPEALS.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

WHEREAS, the above-entitled appeal, pursuant to stipulation of the parties duly filed and approved by the Board, was consolidated for hearing with two appeals then pending before the Board, namely, *Tex-Penn Oil Company* v. *Commissioner,* Docket No. 11539, and *F. B. Parriott* v. *Commissioner,* Docket No. 30989, which stipulation and order of the Board further provided that all testimony might be offered at the hearing in the appeal of *M. L. Benedum* v. *Commissioner,* and that all such testimony so offered and admitted or rejected in such appeal should be deemed to have been offered and admitted or rejected in each of the other two appeals as well, so far as material under the issues in each respectively, and

WHEREAS, it is necessary that certain exhibits should be inspected by the United States Circuit Court of Appeals for the Third Circuit in connection with the record in the above cause, and

WHEREAS, there was so offered and received in evidence as exhibits voluminous documents, maps, charts and statistical data of various kinds in a single copy or issue as to each such exhibit, so that there is not available for

transmission in connection with the separate petition for review of the proceedings in this cause any authentic duplicate of said several exhibits, and

WHEREAS, an appropriate stipulation has heretofore been made and filed in the appeal of *Tex-Penn Oil Company* v. *Commissioner,* Docket No. 11539, providing that various and sundry exhibits of the character above recited shall be transmitted by the Clerk of the United States Board of Tax Appeals to the Circuit Court of Appeals for the Third Circuit for its inspection in connection with the transcript therein and placed in the custody of the Clerk of said Court, all as therein more specifically stated and enumerated, and

WHEREAS, it is necessary that all exhibits so designated in the appeal of Tex-Penn Oil Company for transmission to the Circuit Court of Appeals for the Third Circuit should be inspected by said Court in connection with the record in the above-entitled cause in respect of which petition for review by said Court has been or is about to be duly filed,

IT IS, THEREFORE, stipulated and agreed by and between the parties in the above-entitled cause, through their respective attorneys, that all and several of the original exhibits, both of petitioner and of respondent, as enumerated and identified in stipulation filed in connection with the petition for review in the appeal of *Tex-Penn Oil Company* v. *Commissioner,* aforesaid, shall in accordance with the provisions of Rule 14, Section 5, of the Rules of the United States Circuit Court of Appeals for the Third Circuit be transmitted by the Clerk of the United States Board of

Tax Appeals to said Court, and placed in the custody of the Clerk of said Court, for the use and inspection of said Court in connection with the record in the above-entitled cause as well as in the appeal of said Tex-Penn Oil Company.

Dated: October 23, 1935.

J. C. ADAMS,
Counsel for Petitioner.

ROBERT H. JACKSON,
Counsel for Respondent.

Praecipe.

(Filed November 11, 1935.)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the Petition for Review by the said Circuit Court of Appeals for the Third Circuit, heretofore filed by the above-named petitioner:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board.

   (a) Petition.

   (b) Answer.

   (c) Motion filed February 4, 1929, to consolidate with Docket Numbers 11539 and 30989.

   (d) Order filed February 5, 1929, consolidating this cause with Docket Numbers 11539 and 30989.

   (e) Amended petition filed April 15, 1931, including all annexed copies of deficiency letters and

statements attached thereto, being Exhibits A and B of the amended petition.

(f) Answer to amended petition.

(g) Motion filed May 20, 1931, to strike a portion of the answer and to make more definite and certain.

(h) Order, dated May 25, 1931, granting petitioner's motion to strike, etc., and extending the time within which to file amended answer.

(i) Amended answer to amended petition.

(j) Reply to amended answer.

3. Amended motion to confine hearing in the first instance, filed December 10, 1931.

4. Order filed December 10, 1931, granting motion to confine the hearing in the first instance.

5. Order, entered April 4, 1932, restoring proceedings to the day calendar for further hearing on all questions in dispute under issues as raised by the pleadings.

6. Recomputation of deficiency filed by General Counsel on February 2, 1933.

7. Findings of fact and opinion promulgated August 8, 1933.

8. Motion for additional findings of fact filed by General Counsel September 16, 1933.

9. Motion for leave to withdraw motion of September 16, 1933, filed by General Counsel and order granting same.

10. Petitioner's exceptions to certain of the Board's findings of fact filed February 9, 1935.

11. Motion to adopt several findings and conclusions set forth in "Petitioner's Proposed Findings of Fact" and to allow petitioner exceptions to any refusals, filed February 9, 1935.

12. Order, dated May 9, 1935, denying petitioner's motion of February 9, 1935, for additional findings of fact.

13. Notice of settlement filed by General Counsel.

14. Notice under Rule 50 of hearing on respondent's proposed computation.

15. Computation of deficiency as submitted by respondent on June 27, 1935.

16. Petitioner's objections to respondent's computation with annexed counter-computation by petitioner, filed July 13, 1935.

17. Respondent's request and motion for additional findings filed by General Counsel July 17, 1935, with order thereon denying such motion.

18. The decision and order of redetermination made and entered herein on the 18th day of July, 1935.

19. Motion filed October 3, 1935, to fix amount of bond.

20. Order entered October 8, 1935, fixing amount of bond at $3,250,000.

21. Supersedeas bond in the amount of $3,250,000 lodged October 15, 1935, together with the order thereon and exception taken and allowed as entered.

22. Petition for review by the United States Circuit Court of Appeals for the Third Circuit with assignments of error filed by petitioner October 15, 1935.

23. Notice of filing of Petition for review and acceptance of service, filed October 15, 1935.

24. Statement of Evidence.

25. Stipulation of the parties upon settlement of the Statement of Evidence.

26. Board's approval and settlement of the Statement of Evidence.

27. Stipulation for transmission of certain exhibits without printing.

28. This præcipe for record.

29. Notice of filing this præcipe for record and the admission of service thereof.

WESTON VERNON, JR.,
Attorney for Petitioner on Review.

Service of a copy of this præcipe
is hereby admitted this 11th day of
November, 1935.

(s) ROBERT H. JACKSON,
Assistant General Counsel,
Bureau of Internal Revenue.

Notice of Filing of Praecipe.

(Filed November 11, 1935.)

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON, D. C.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

To: ROBERT H. JACKSON, Esq.,
Assistant General Counsel for the
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

PLEASE TAKE NOTICE that on the 11th day of November, 1935, the undersigned, Attorney for M. L. Benedum, the petitioner in the above-entitled proceeding, has filed with the Clerk of the United States Board of Tax Appeals a Præcipe for record, a copy of which is annexed hereto.

Dated, November 11, 1935.

WESTON VERNON, JR.,
Attorney for Petitioner.

Receipt of the foregoing notice of filing the Præcipe for record and service of a copy of the Præcipe herein mentioned is acknowledged this 11th day of November, 1935.

(s) ROBERT H. JACKSON,
Assistant General Counsel
for the Bureau of Internal Revenue,
Attorney for Respondent.

Certificate.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON, D. C.

M. L. BENEDUM, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 30990

I, B. D. GAMBLE, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages, 2035 to 2185, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Præcipe in the appeal as above numbered and entitled.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals at Washington in the District of Columbia this day of December, 1935.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.